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In The
Supreme Court of the United States
October Term, 1984

EDWARD MALLEY AND
THE STATE OF RHODE ISLAND,
Petitioners,

vs.

JAMES R. BRIGGS AND LOUISA BRIGGS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a police officer who believes the facts in his arrest warrant affidavit to be true, who submits such an affidavit to a neutral and detached judge for a probable cause determination, and who obtains the arrest warrant from the judge can be held liable for "constitutional negligence" under 42 U.S.C. § 1983 for damages resulting from the arrest because it is subsequently determined that the police officer should have known that the facts recited in his affidavit did not constitute probable cause.

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EDWARD MALLEY AND
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Now come Petitioners, Edward Malley and the State of Rhode Island, by their attorneys, and respectfully pray that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court

of Appeals for the First Circuit entered in this proceeding on November 19, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit, reported at 748 F.2d 715, is reproduced in Appendix A.

The unpublished Order of the United States District Court for the District of Rhode Island, dated February 2, 1984, is reproduced in Appendix B. The unpublished Opinion and Order of the United States District Court for the District of Rhode Island, dated May 14, 1984, is reproduced in Appendix C.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the First Circuit was entered on November 19, 1984. On February 13, 1985, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including April 5, 1985. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In December of 1980, the Rhode Island State Police were conducting a court-authorized wiretap in connection with a narcotics investigation. This wiretap investigation was being supervised by petitioner Edward Malley, who at the time held the rank of Trooper with the Rhode Island State Police and was assigned to narcotics duty in the detective division.

As part of this wiretap investigation, Trooper Malley reviewed the logged information regarding a telephone call that subsequently served as the basis for submitting affidavits and applications for arrest warrants for respondents James and Louisa Briggs. After reviewing the logged information regarding the telephone call and discussing the drug terminology used in the conversation with his partner, Trooper Malley concluded in good faith that an incriminating telephone call had been made regarding Mr. and Mrs. Briggs. Accordingly, Trooper Malley put the information that was in his possession into affidavits and applications for arrest warrants for James and Louisa Briggs, which he presented to Judge Capelli of the Rhode Island District Court. The Judge issued the arrest warrants for James and Louisa Briggs, who were subsequently arrested. The charges against Mr. and Mrs. Briggs were later dropped, because the grand jury to which the charges were presented returned no true bill.

On September 18, 1981, James and Louisa Briggs filed a complaint under 42 U.S.C. § 1983 against Edward Malley and the State of Rhode Island in the United States District Court for the District of Rhode Island alleging Fourth and Fourteenth Amendment violations.[1] The jurisdiction

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[1] Mr. and Mrs. Briggs also alleged pendent state claims of malicious prosecution, defamation, and false imprisonment.

of the District Court was invoked under 28 U.S.C. § 1343(3). In their complaint, Mr. and Mrs. Briggs alleged that they had been unlawfully arrested and imprisoned because the arrest warrants by which they were arrested were constitutionally deficient in that the affidavits submitted in support of the warrant applications did not set forth sufficient facts to establish probable cause to believe that Mr. and Mrs. Briggs had committed the offense alleged.

The case was tried before a jury in February of 1984. At the close of plaintiffs' evidence, defendants Malley and the State of Rhode Island moved for a directed verdict; the trial judge granted the motion as to both defendants. Mr. and Mrs. Briggs filed a Motion for New Trial or, in the Alternative, for Relief from Judgment, which was denied by the trial judge. In ruling in favor of Trooper Malley on both of these motions,[2] the trial judge determined that a policeman who believes the facts in his arrest warrant affidavit to be true and who submits such an affidavit to a neutral and detached judge for a probable cause determination cannot be held liable under 42 U.S.C. § 1983 for two reasons: (1) such a policeman is immune from liability; and (2) the judge's intermediate decision to issue an arrest warrant breaks the causal chain and insulates such a policeman from liability. App. B and C.

Mr. and Mrs. Briggs appealed from the judgment in favor of Trooper Malley. The Court of Appeals for the First Circuit reversed the trial judge, deciding that "judi-

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[2]Because Mr. and Mrs. Briggs did not appeal the Judge's ruling in favor of the State of Rhode Island, that ruling is not at issue here and accordingly is not discussed.

cial approval of a warrant cannot act as an absolute bar to the § 1983 liability of the officer who obtained the warrant." *Briggs v. Malley*, 748 F.2d 715, 721 (1st Cir. 1984) (App. 16). The court emphasized that § 1983 liability will attach where an officer is " 'constitutionally negligent,' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause . . . ." *Id.* On the other hand, in those cases in which "the sufficiency of the facts fall into the grey area appropriate for judicial determination, submission of the affidavit to a magistrate will insulate the officer from liability." *Id.* Because the Court of Appeals determined that the district court had improperly directed a verdict for Trooper Malley, the court reversed and remanded for a new trial.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this matter to resolve the question of whether a police officer is liable under 42 U.S.C. § 1983 for damages resulting from an arrest that was conducted pursuant to a warrant that he sought and that was issued by a neutral and detached judge. This writ should be granted because the Court of Appeals' decision, which held that a police officer could be so liable, is in conflict with principles enunciated by this Court regarding the division of functions between neutral and detached judges or magistrates[3] and police

[3]Because the judicial reviewing authority in the warrant process is sometimes labeled a judge and sometimes labeled a magistrate, both of these terms may be found in the applicable case law and often are used interchangeably. Accordingly, both of these terms will be used in this petition to mean the judicial officer who receives the information from the police officer and who makes the determination of whether probable cause exists and whether a warrant should issue.

officers in seeking and issuing warrants. *See Massachusetts v. Sheppard*, —U.S.—, 104 S. Ct. 3424 (1984); *Baker v. McCollan*, 443 U.S. 137 (1979); *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Johnson v. United States*, 333 U.S. 10 (1948). In addition, the Court of Appeals' decision incorrectly applies the principles of qualified immunity set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Finally, the Court of Appeals' decision is in conflict with the chain of causation principles outlined by other Circuit Courts of Appeals. *See McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982); *Garris v. Rowland*, 678 F.2d 1264 (5th Cir.), *cert. denied sub nom. Ft. Worth v. Garris*, 459 U.S. 864 (1982); *Smith v. Gonzales*, 670 F.2d 522 (5th Cir.), *cert. denied*, 459 U.S. 1005 (1982); *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982); *Ames v. United States*, 600 F.2d 183 (8th Cir. 1979); *Rodriguez v. Ritchey*, 556 F.2d 1977 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

The Court Of Appeals' Decision Is In Conflict With This Court's Principles Regarding The Functions Of Police Officers And Magistrates.

According to the Court of Appeals' decision, even if a neutral and detached magistrate or judge determines that probable cause exists and issues an arrest warrant, the police officer can still face liability if the magistrate is later overruled and if the overruling authority decides that the officer should have known that the facts recited in his supporting affidavit did not constitute probable cause. That decision is in conflict with this Court's recognition that there is a "reasonable division of functions" between police officers, magistrates, and judicial officers. *Baker v. McCollan*, 443 U.S. at 145. This Court has

determined that one facet of this division of functions is best instituted by having police officers engage in ferreting out crime and by having neutral and detached magistrates determine the existence of probable cause and issue warrants. *Gerstein v. Pugh,* 420 U.S. at 112-13. Thus, while there is no rule absolutely prohibiting a police officer from arresting an individual for a felony without a warrant if the police officer determines that probable cause to arrest exists, *United States v. Watson,* 423 U.S. 411, 416-17 (1976), there is a preference for the use of arrest warrants when feasible. *Beck v. Ohio,* 379 U.S. 89, 96 (1964). The "classic statement" of the principle requiring "that the existence of probable cause be decided by a neutral and detached magistrate whenever possible," *Gerstein v. Pugh,* 420 U.S. at 112, is found in *Johnson v. United States,* 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14 (footnote omitted). Thus, the preference is that it be the role of the magistrate, not of the police officer, to draw inferences from the evidence and to determine if probable cause exists.[4] The police officer's role, on the

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[4]As this Court has noted:

> [T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make ar-

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other hand, is to "ferrest out crime" and to bring the evidence of such crime to the magistrate for the magistrate's neutral and independent review.

If the Court of Appeals' decision is left undisturbed, it will change the nature of this Court's determination of the proper roles of the police officer and the magistrate in the warrant process. In essence, the lower court's decision requires the police officer not only to do his duty regarding investigating and "ferreting out crime" but also to determine in the first instance whether probable cause exists in order to justify bringing certain factual information regarding potential criminal activity to the attention of a neutral and detached magistrate.

The Court of Appeals has added a new layer to the constitutional dimension of probable cause; now, in addition to the constitutional requirement that warrants shall issue only on probable cause, comes the requirement that a police officer shall submit information in support of an application for a warrant to a neutral and detached magistrate only if the police officer can fairly surely say that probable cause exists before he submits the information to the magistrate. The function of the neutral and detached magistrate, while still existing in theory, actually has been passed on to the police officer, who must make an accurate

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> rests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.

Johnson v. United States, 333 U.S. at 14 n.3, *quoting United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

initial determination of the existence of probable cause or face personal civil liability under 42 U.S.C. § 1983.

Although the Court of Appeals carved out a "grey area" in which a police officer supposedly will not face liability for presenting information to a magistrate for the magistrate's review, such an area free from potential liability is an illusion. In reality, under this decision the police officer will always face potential liability for presenting the information available to him to the magistrate for an independent and detached review regarding the presence of probable cause, because even if the magistrate determines that probable cause exists and issues the warrant, the police officer can still face liability if the magistrate is later overruled and if it is determined that the officer should have known that the facts recited in his supporting affidavit did not constitute probable cause. Thus, even if the police officer believes that the facts in his possession fit within the "grey area," he cannot be assured that any future reviewing authority will agree that he was correct in that belief.

Accordingly, the police officer is given the responsibility by the Court of Appeals to make a complete and accurate determination of the existence of probable cause before he submits the information in his possession to a magistrate for the magistrate's review . Because this new division of responsibility between a police officer and a magistrate so changes this Court's enunciated principles regarding the proper roles of police officers and magistrates in the warrant process, this Court should grant this Writ of Certiorari to review the decision.

The Court Of Appeals' Decision Incorrectly Applies The Principles Of Harlow v. Fitzgerald Qualified Immunity.

This Court's most recent decision regarding the standard by which to judge the qualified immunity available to government officials is *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which the Court held "that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. This standard is one of "objective reasonableness . . . measured by reference to clearly established law." *Id.* (footnote omitted).

The Court of Appeals decided that the *Harlow* standard "should be understood to prohibit conduct which is 'constitutionally negligent.'" *Briggs v. Malley*, 748 F.2d at 718 (App. 16). In the situation where a police officer submits affidavits in support of an application for an arrest warrant to a judge, the court defined "constitutionally negligent" to be that situation in which the officer seeks judicial determination of sufficiency of an affidavit if the officer should have known that the facts recited in the affidavit did not constitute probable cause. *Id.* at 721. The court further determined that a "grey area" exists, in which it is appropriate for a police officer to seek judicial determination of sufficiency of an affidavit; in this area, a police officer will be immune from liability if he submits the affidavit to the magistrate for the magistrate's review. *Id.*

This decision by the Court of Appeals, while ostensibly applying the *Harlow* standard to its factual situation, actually conflicts with the basic principles enunciated in

Harlow and in other decisions by this Court regarding the relationship between police officers and reviewing magistrates or judges.

The standard set forth in *Harlow*, as applied to this case, is that a police officer will be immune from liability if *his conduct* does not violate clearly established constitutional rights of which a reasonable police officer would have known. The only conduct by Trooper Malley complained of in this action is that Trooper Malley presented the information in his possession to a judge for review. Such conduct, however, cannot be considered as a violation of Mr. and Mrs. Briggs' constitutional rights; if the judge had rejected Trooper Malley's application for an arrest warrant, there would not even have been any knowledge by Mr. and Mrs. Briggs of Trooper Malley's actions, let alone any violation of their constitutional rights.

Undoubtedly it is true "that under our system of government the police have a duty to fight crime without violating constitutional rights." *Briggs v. Malley*, 748 F.2d at 719 (App. 13). It cannot be expected, however, that a police officer should believe that taking the information in his possession to a neutral and detached magistrate for the magistrate's review would violate a person's constitutional rights.[5] In fact, just the opposite is true, because taking such information to a neutral and detached magistrate is what this Court has directed the police officer to do in order to assure the "maximum protection" for a person's rights:

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[5]It is recognized that the police officer could face liability if he misled the magistrate by information in the affidavit that the police officer knew was false or would have known was false except for his reckless disregard of the truth. *See United States v. Leon*, — U.S. —, 104 S. Ct. 3405, 3421 (1984).

> Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest . . . .

Gerstein v. Pugh, 420 U.S. at 113. It is the reviewing magistrate, not the police officer, who is given the role of being the individual's "single-minded protector." *Madison v. Manter*, 441 F.2d 537, 539 (1st Cir. 1971). *See also Johnson v. United States*, 333 U.S. at 13-14. Thus, it cannot be an error of constitutional dimension for a police officer to present the information that he possesses to the magistrate, the "single-minded protector" of an individual's constitutional rights, for the magistrate's review and determination of whether probable cause exists. *See Massachusetts v. Sheppard*, —U.S.—, 104 S. Ct. 3424 (1984).

The Court of Appeals rejected this standard of designating the magistrate or reviewing judge as the individual's "sole protector," stating that such a standard would encourage "sloppy police work" and enlarge "the margin of error leading to unconstitutional invasions of our persons and homes." *Briggs v. Malley*, 748 F.2d at 720 (App. 13-14). Such a conclusion, however, does not follow from the fact that a neutral and detached magistrate is assigned the role of "protector" of the individual's rights. The protector status of the magistrate is that of "*single-minded*" protector, not "*sole*" protector. The police officer, too, has the role of protector in the arrest process, which role is fulfilled by bringing the information in his possession to a neutral and detached magistrate for the magistrate's review. Once a police officer fulfills his duty as "protector" in this way, the role of "protector" shifts to the magistrate. Police officers have nothing to gain by being sloppy in assembling their information if they know that it will be independently reviewed and assessed by the

magistrate, who will reject it if the proper standards are not met. Further, having a judge, with legal experience and training, review the information and make an independent assessment of the existence of probable cause should decrease any margin of error that might otherwise exist, for the judge has the advantage of being more detached from the "competitive enterprise of ferreting out crime" than the police officer. *Johnson v. United States*, 333 U.S. at 14.

The Court of Appeals' reasoning appears to be based on the belief that "[u]nfortunately, not all magistrates subject the affidavit to the scrutiny required by the fourth amendment." *Briggs v. Malley*, 748 F.2d at 720. The standard for a police officer's liability, however, should not be determined by the fear that certain judges and magistrates may not adequately fulfill the role assigned to them. Rather, a police officer's liability should be based on his *own* conduct. If the magistrate issues a warrant based upon the accurate information presented to him by the police officer, but the warrant lacks probable cause, "[a]n error of constitutional dimensions may have been committed . . . , but it was the judge, not the police officer[], who made the critical mistake." *Massachusetts v. Sheppard*, 104 S. Ct. at 3429.[6]

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[6]The Court of Appeals appears to have recognized this principle, but it was concerned that:

> [t]he absolute judicial immunity of the magistrate precludes suit against him or her. Were we to permit the interposition of the magistrate between the police officer and the warrant to immunize the negligence of the police officer, such plaintiffs would be rendiless.

Briggs v. Malley, 748 F.2d at 720. The fact that the magistrate is immune from liability, however, does not mean that his negligence or misconduct should be transferred to the police officer.

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A police officer should not be punished for relying on the neutral and detached judgment of a magistrate in determining the existence of probable cause for arrest. Surely a police officer should not be asked to question the policy set down by this Court of paying great deference to a magistrate's determination of probable cause. *See Illinois v. Gates*, —U.S.—, 103 S. Ct. 2317, 2331 (1983). "In certain situations there is an overriding societal interest in having individuals rely on the authoritative pronouncements of officials whose decisions we wish to see respected." *United States v. Barker*, 546 F.2d 940, 947 (D.C. Cir. 1976).[7]

Accordingly, a police officer should be found to have acted "objectively reasonable," and therefore to be immune from liability, in those circumstances in which he submits the information that he possesses to a neutral and detached magistrate or judge for a probable cause determination. Such an officer is acting pursuant to the direction of this Court and, as such, is acting in a *per se* objectively reasonable fashion.

Because the Court of Appeals' decision incorrectly applies this Court's principles of qualified immunity, the Court should grant this Writ of Certiorari to review the decision.

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In addition, the Court of Appeals has failed to consider that its standard requires a police officer to be able to identify the presence or absence of probable cause when such identification is unable to be made by a judge who is trained in much greater detail to make such identification.

[7]If the work of a police officer is to proceed effectively, he must be made to " 'understand that action taken in the good-faith fulfillment of [his] responsibilities and within the bounds of reason under all the circumstances will not be punished and that [he] need not exercise [his] discretion with undue timidity.' " *Procunier v. Navarette*, 434 U.S. 555, 562 (1978), *quoting Wood v. Strickland*, 420 U.S. 308, 321 (1975).

The Court Of Appeals' Decision Creates A Conflict Among The Circuits Regarding The Chain Of Causation.

The rule generally followed in other Circuit Courts of Appeals is that "if the facts supporting an arrest are put before an intermediate such as a magistrate or grand jury, the intermediate's decision breaks the casual chain and insulates an initiating party." *Rodriguez v. Ritchey,* 556 F.2d at 1193. *See McSurely v. McClellan,* 697 F.2d at 324; *Garris v. Rowland,* 678 F.2d at 1273 n.6; *Smiddy v. Varney,* 665 F.2d at 266 (filing of criminal complaint immunizes investigating officers from damages suffered thereafter); *Ames v. United States,* 600 F.2d at 185 (grand jury indictment breaks chain of causation). The standard is that the rule will apply absent any allegation of presentation of false evidence or the withholding of evidence, *id.*, on the theory that the intervening actor made independent decisions that broke the chain of causation. *Smith v. Gonzales,* 670 F.2d at 526; *Dellums v. Powell,* 566 F.2d at 193.

This theory is obviously relevant in the instant case, because Trooper Malley submitted the information in his possession to the judge for the judge's independent review and evaluation. No allegations have been made that Trooper Malley withheld evidence or presented false evidence, and no allegations have been made that the judge failed to make an independent decision regarding the existence of probable cause and the issuance of the arrest warrants. Therefore, according to the principles of the causation theory, the judge's exercise of his independent responsibility broke the chain of causation and insulated Trooper Malley from liability.

The Court of Appeals' decision summarily rejected the theory of causation adopted by other Circuit Courts of Appeals. *Briggs v. Malley*, 748 F.2d at 721 (App. 15-16). Accordingly, the Writ of Certiorari should be granted, because only this Court can resolve this conflict among the circuits.

CONCLUSION

Because the Court of Appeals' decision in this matter (1) is in conflict with principles enunciated by this Court regarding the division of functions between neutral and detached judges or magistrates and police officers in seeking and issuing warrants, (2) incorrectly applies the principles regarding qualified immunity established by this Court, and (3) is in conflict with the chain of causation principles outlined by other Circuit Courts of Appeals, this Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

James R. BRIGGS, and Louisa Briggs,

Plaintiffs, Appellants,

v.

Edward MALLEY, et al.,

Defendants, Appellees.

No. 84-1449.

United States Court of Appeals,
First Circuit.

Argued Sept. 13, 1984.

Decided Nov. 19, 1984.

Plaintiffs brought civil rights action arising out of their arrest. The United States District Court for the District of Rhode Island, Raymond J. Pettine, Senior District Judge, directed verdict for police officers, and plaintiffs appealed. The Court of Appeals, Bownes, Circuit Judge, held that judicial approval of arrest warrant did not serve as absolute bar to civil rights liability of police officer who obtained warrant.

Reversed and remanded for new trial.

Aldrich, Senior Circuit Judge, filed a concurring opinion.

1. Civil Rights 13.8(4)

Issuance of arrest warrant by judicial officer does not provide an impregnable shield against liability under civil rights statute for negligent conduct. 42 U.S.C.A. § 1983.

2. Civil Rights 13.8(1)

Presence of subjective good faith or absence of malice on part of public employee is irrelevant to determination of immunity; rather, conduct of state and government officials is to be measured by objective reasonableness standard and conduct which violates clearly established statutory or constitutional rights of which reasonable person would have known will support civil rights liability. 42 U.S.C.A. § 1983.

3. Civil Rights 13.8(1)

Official conduct which negligently leads to violation of constitutional rights is sufficient to overcome any qualified immunity official may have against civil rights liability. 42 U.S.C.A. § 1983.

4. False Imprisonment 7(3)

It is not negligence for a police officer to seek an arrest or search warrant in a merely questionable situation; in such a case, determination by magistrate that a warrant should issue will insulate officer from a negligence claim.

5. Civil Rights 13.8(4)

Judicial approval of an arrest warrant cannot serve as an absolute bar to civil rights liability of officer who obtained warrant; however, liability does not attach simply because there is a later determination of no probable cause but attaches only where officer is constitutionally negligent, where officer should have known that facts recited in affidavit did not constitute probable cause; disavowing

Madison v. Manter, 441 F.2d 537 and *Stadium Films, Inc. v. Baillargeon*, 542 F.2d 577.

6. Civil Rights 13.8(4)

Judicial approval of an arrest warrant did not serve as an absolute bar to civil rights liability of officer who obtained warrant. 42 U.S.C.A. § 1983.

John S. Foley, Providence, R.I., with whom Decof & Grimm, Providence, R.I., was on brief for plaintiffs, appellants.

Faith A. LaSalle, Sp. Asst. Atty. Gen., Providence, R.I., with whom Dennis J. Roberts, II, Atty. Gen., Providence, R.I., was on brief for defendants, appellees.

Before BOWNES, Circuit Judge, ALDRICH and SKELTON,* Senior Circuit Judges.

BOWNES, Circuit Judge.

Plaintiffs James and Louisa Briggs were arrested in March of 1981 under an arrest warrant which was obviously lacking in probable cause. The issue before us is whether the police officer who submitted the inadequate affidavit upon which the arrest warrant was based can be held liable for negligence under 42 U.S.C. § 1983 for damages resulting from the arrest. The district court directed a verdict for the officer, holding that the issuance of the arrest warrant by a judge insulated the officer from liability.

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* Of the Federal Circuit, sitting by designation.

The arrest of Mr. and Mrs. Briggs was triggered by the interception of a telephone call on a court-authorized wiretap in connection with a narcotics investigation of one Paul Driscoll, who was a friend of the Briggs' daughter, Jamie. The police officer on duty noted the substance of this call on a call log. The call log stated that the caller identified himself as "Dr. Shogun" and that there was a general conversation about a party the preceding night. The call log indicated that "caller says I can't believe I was token [*sic*] in front of Jimmy Briggs—caller states he passed it to Louisa—caller and Paul talk about another party going down tonight—Paul says Nancy was sitting in his lap rolling her thing . . . ." The investigation was being directed by defendant Edward Malley, who at that time held the rank of corporal with the Rhode Island State Police and was assigned to narcotics duty in the detective division. Malley was not present when the call from "Dr. Shogun" was intercepted, but discussed the drug terminology with his partner, Detective Youngsma. They determined that the call was incriminating because "token" is drug parlance for smoking marijuana and "rolling her thing" means rolling a marijuana cigarette. After the wiretap was shut down, Malley prepared affidavits for the issuance of arrest warrants for twenty-two people based upon the information obtained from the tap on Driscoll's phone.

Based solely on the conversation related above, Malley prepared an affidavit and arrest warrant form and a district court felony complaint form for both James and Louisa Briggs. The crime charged in the felony complaint

was conspiracy to possess marijuana, a misdemeanor.[1] After preparing the affidavit, arrest warrant and complaint forms, Malley then appeared before a judge of the Rhode Island District Court, who issued arrest warrants for James and Louisa Briggs as well as twenty other individuals. Plaintiffs were arrested about twenty-three days later in the early hours of the morning. They were taken to the state police barracks and later that day to court for arraignment. The fact of their arrest was published in the local and statewide newspapers. The charges against plaintiffs were subsequently dropped because the grand jury to which the charges were presented returned no true bill.

Plaintiffs commenced an action under 42 U.S.C. § 1983 against both Corporal Malley and the State of Rhode Island alleging fourth and fourteenth amendment violations and additionally filed state law claims of malicious prosecution, defamation and false imprisonment against the same defendants. The case was tried before a jury in February of 1984 and, at the close of plaintiff's evidence, both defendants moved for a directed verdict. The trial judge delivered an opinion from the bench in late February granting the motion as to both defendants. Plaintiffs filed a motion for a new trial, bringing to the trial judge's attention this court's February 6, 1984 decision in *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7 (1st Cir. 1984). The district court, in a second opinion, denied plaintiff's motion for a new trial. Plaintiffs have appealed

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1. At the trial below, Malley said that this was a mistake and that the charge was actually conspiracy to possess marijuana with intent to deliver, which is a felony, because "[i]n a wiretap all charges are conspiracy."

from the judgment in favor of Malley, but not the judgment in favor of Rhode Island.

In its initial opinion directing a verdict for Corporal Malley, the district court relied upon two lines of precedent. Under the First Circuit cases of *Madison v. Manter*, 441 F.2d 537 (1st Cir. 1971), and *Stadium Films, Inc. v. Baillargeon*, 542 F.2d 577 (1st Cir. 1976), the district court found police officers to be immune from liability for negligently seeking warrants without probable cause. In both these cases, we had applied the state law of privilege or immunity which required malice before a police officer could be held liable for improper prosecution. *Madison*, 441 F.2d at 538; *Stadium Films*, 542 F.2d at 578. Acknowledging, however, that this approach may have been undercut by recent developments in good faith immunity set out in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the district court turned to Fifth Circuit precedent because it provided a more solid basis for the same result. In *Rodriquez v. Ritchey*, 556 F.2d 1185 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 894, 54 L.Ed.2d 799 (1978), and *Smith v. Gonzales*, 670 F.2d 522 (5th Cir. 1982), *cert. denied*, 459 U.S. 1005, 103 S.Ct. 361, 74 L.Ed.2d 397 (1982), the Fifth Circuit held that when "the facts supporting an arrest are put before an intermediary, such as a Magistrate or Grand Jury, the intermediary's decision to issue a warrant or return an indictment, breaks the causal chain and insulates the initiating party." *Smith*, 670 F.2d at 526. Thus, regardless of any developments in immunity law allowing negligent conduct to ground § 1983 liability, the district court found that the approval of the arrest warrant by the judge removed any causal connection between the acts of the police officer

and the damage suffered by the plaintiffs due to their improper arrest.

In its second opinion, reconsidering its decision in light of *B.R.C. Transport Co., Inc. v. Fontaine,* 727 F.2d 7, the district court indicated that it did not find *B.R.C.* to be a decisive break with past First Circuit precedent. In *B.R.C. Transport Co., Inc. v. Fontaine,* we upheld a jury verdict awarding damages against a police officer for a search and seizure which violated the fourth amendment. We held that where a police officer obtained a search and arrest warrant based upon information furnished by a complainant-victim, the presence of probable cause was still an issue for the trier of fact, as was the issue of the officer's reasonableness under the *Harlow* immunity standard. In a footnote, we rejected the officer's argument that the magistrate's approval of the warrant prevented a jury from reaching behind this approval and determining probable cause: "[T]his judicial imprimatur is [not] an impregnable shield against any attack on the sufficiency of the underlying affidavit." 727 F.2d at 10 n. 1. We then went on to apply the *Harlow* immunity test to determine whether the officer's conduct in swearing out the affidavit had been objectively reasonable. Implicit in our use of this test was the determination that just as a judicial imprimatur does not serve as an impregnable shield against determining the sufficiency of the underlying affidavit, it would also not serve to shield a police officer from liability due to the improper submission of an insufficient affidavit.

The district court pointed out that *B.R.C.* failed to address the possibility that judicial approval of the warrant immunized the police officer who obtained the war-

rant without probable cause, neither recognizing the existence of contrary First Circuit precedent or substantially responding to it. In addition, the court found that the new standard of good faith immunity set out in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), did not undercut the holdings of *Madison v. Manter,* 441 F.2d 537 (1st Cir. 1971), and *Stadium Films, Inc. v. Baillargeon,* 542 F.2d 577 (1st Cir. 1976), because the immunity provided by these cases rested upon public policy considerations not addressed by the *Harlow* decision. The district court also went on to hold that it found the "chain of causation" approach of the Fifth Circuit persuasive even if the immunity approach failed.

[1] Although we agree with the district court that the analysis provided by *B.R.C. Transport* was inadequate to support the break with our prior precedent which it in fact makes, we find that the case nonetheless applied the correct legal principle. We now provide the analysis of our prior precedent necessary to support our holding that the issuance of a warrant by a judicial officer does not provide "an impregnable shield" against liability under § 1983 for negligent conduct.

We begin by considering our own precedent in light of recent developments in the defense of "good faith" immunity for police officers. In *Madison v. Manter,* 441 F.2d 537 (1st Cir. 1971), this court held that negligent procurement of a search warrant would not support liability under § 1983. We relied upon *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), the then controlling case on good faith immunity for police officers under § 1983, which held that the common law defenses to false arrest were available to police officers in § 1983 actions.

Madison involved the procurement of a search warrant by local Massachusetts police officers upon the observation of an ordinary smoker's pipe on the floor of a car. The warrant was later found to be without probable cause. Under Massachusetts law, the officers could not be found liable for improper prosecution without a showing of malice. The court found that this immunity from negligence was supported by important policy considerations:

> A police officer has a much larger public to protect than the individual who, in good faith, he suspects of a crime. He, too, may be discouraged from seeking warrants if the cost is a suit for negligence. The inindividual who is the object of a warrant has a mere singleminded protector—the official whose duty it is to screen the application before issuing the warrant.

Madison, 441 F.2d at 539. *Stadium Films, Inc. v. Baillargeon,* 542 F.2d 577 (1st Cir. 1976), for the most part relied upon the reasoning of *Madison.* The court found that even if local Rhode Island police officers "should have known" that the warrants they sought were constitutionally infirm, Rhode Island common law immunized them from liability for such negligence, and under *Pierson* this immunity would extend to § 1983 actions as well.

[2] We first note that, since *Pierson,* the Supreme Court has moved away from a reliance upon state law and toward a federal standard of immunity under § 1983. *E.g., Wood v. Strickland,* 420 U.S. 308, 322, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975); *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Under the *Harlow* test, the presence of subjective good faith or the absence of malice is irrelevant to the determination of immunity. The conduct of state and government officials is to be measured by an "objective reasonableness"

standard; conduct which violates "clearly established statutory or constitutional rights of which a reasonable person would have known" will support § 1983 liability. *Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738. While the Court has not expressly applied this standard to the § 1983 liability of police officers, its adoption of the *Harlow* standard to determine the good faith of police officers for suppression purposes in *United States v. Leon,* — U.S. —, — & n. 23, 104 S.Ct. 3405, 3421 & n. 23, 82 L.Ed.2d 677 (1984), suggests that it is also applicable to police officers for § 1983 purposes.[2] This objective reasonableness standard replaces the subjective bad faith/malice standards of immunity previously incorporated into § 1983 from state tort law under *Pierson.*

[3] Under the new *Harlow* standard, official conduct which negligently leads to the violation of constitutional rights is sufficient to overcome any qualified immunity that official may have. The objective reasonableness standard should be understood to prohibit conduct which is "constitutionally negligent." This reading of *Harlow* is supported by the Supreme Court's holding in *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), that negligent deprivations of constitutional

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2. This reading is supported by Justice Stevens' dissent: "As the majority recognizes, *United States v. Leon, ante,* [104 S.Ct.] at 3421-3422 and n. 23, in all cases in which its "good faith" exception to the exclusionary rule would operate, there will also be immunity from civil damages." *United States v. Leon,* — U.S. —, — n. 35, 104 S.Ct. 3405, 3456 n. 35, 82 L.Ed.2d 677 (1984) (Stevens, J., dissenting).

rights are actionable under § 1983. *Id.* at 534, 101 S.Ct. at 1912.[3]

As the district court recognized, the negligence standard set forth by *Harlow* precludes the reliance on state tort law defenses found in *Madison* and *Stadium Films*. The district court, however, found that the concept of official immunity rests upon two independent foundations. Immunity serves, in part, to delimit the degree of culpability required before the "shield of immunity" will be lifted from a public official. This the district court described as the "good faith" aspect of immunity. Immunity also rests upon considerations of public policy: in this kind of case, the potential 'chill' upon law enforcement activities which the possibility of personal liability might create. While *Harlow* did address the issue of culpability by eliminating the subjective, "bad faith" prong of the immunity analysis, the district court found that it had not addressed the policy concerns implicated in such immunity. Therefore, since the rejection of negligence as a basis for police officer liability in both *Madison* and *Stadium Films* also rested upon these policy considerations, the district court considered them to still be valid precedent.

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3. While the holding in *Parratt* is not stated as a holding on the contours of official immunity under § 1983, it cannot be understood to be anything else. The lack of causality which had proven fatal to other attempts to bring negligence under § 1983, see *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), was not an issue because the Court simply assumed the requisite causal connection was present. This left only the issue of culpability, which is one facet of the immunity doctrine.

While we disagree with the district court's view that the *Harlow* standard fails to address policy considerations, we do recognize that this standard was initially developed for application to high executive officials, not police officers. Clearly, there are different public interests at stake where the arena is crime and public safety and the issue is police officer liability for seeking search or arrest warrants. While we conclude that these interests do not necessitate a higher degree of immunity for police officers, we do find it appropriate to address the district court's reasoning in some detail.

[4] We begin with the contention that subjecting police officers to the possibility of personal liability for seeking search or arrest warrants without probable cause will chill them in the performance of their duties. Certainly if the standard of negligence were such that any time a subsequent determination of no probable cause was made a police officer would be considered "constitutionally negligent," then a valid claim of 'chill' could be made. This, however, is not what we understand the standard to be. It is to be noted first that police officers are routinely called upon to make a judgment of whether there is or is not probable cause. Consequently, it is a standard whose basic contours a police officer can reasonably be expected to know. We recognize, however, that police officers cannot be held to the standards of lawyers or judges. It cannot be considered negligence, therefore, for a police officer to seek an arrest or search warrant in a merely questionable situation. In such a case, the determination by the magistrate that a warrant should issue will insulate the officer from a negligence claim. There is a clear difference, however, between a situation in which

there might be probable cause and a situation in which there is *no* probable cause. Under this standard of negligence, we find an emphasis upon the chilling effects of such liability on zealous crime fighting to be inappropriate. This argument overlooks the fact that under our system of government the police have a duty to fight crime without violating constitutional rights. This is difficult at times, but it is what the constitution requires. If we cannot demand of our police officers that they recognize when they do not have the authority to make a search or effect an arrest, then we have given up the very idea of a rule of law. The exercise of police power *within* the law is the very foundation of the social contract.[4] We should expect police officers to have a basic understanding of the limits of their power and we must hold them liable when, negligently or intentionally, they overstep these bounds.

A second argument is made in *Madison* that where a warrant is sought, it is not the police officer who has the burden of protecting fourth amendment rights, but rather the independent magistrate since, unlike the police officer, the magistrate has no conflict in interest between a duty to fight crime and a duty to preserve constitutional rights. The danger in making the magistrate the sole protector of the fourth amendment, however, is twofold. It

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4. [M]ankind will be in a far worse condition than in the state of Nature if they shall have armed one or a few men with the joint power of a multitude, to force them to obey at pleasure the exorbitant and unlimited decrees of their sudden thoughts, or unrestrained, and till that moment, unknown wills, without having any measures set down which may guide and justify their actions.

John Locke, Two Treatises of Government 187 (Dutton, Everyman's Library: New York).

encourages sloppy police work and it enlarges the margin of error leading to unconstitutional invasions of our persons and homes. Unfortunately, not all magistrates subject the affidavit to the scrutiny required by the fourth amendment. The instant case is a perfect example of this. Moreover, the aura of urgency that often surrounds the warrant application process sometimes leads a magistrate to overlook the obvious. At times, the seriousness of the crime being investigated distorts the focus of the magistrate from the facts recited in the warrant application. Under such circumstances, the magistrate is a conduit, not an insulator. The exercise of reasonable judgment by police officers can prevent such errors from occurring without unduly interfering with their crime fighting duties.

We also find that there are significant policy arguments in favor of allowing such liability. The spectre of personal liability may well serve as a deterrent both for individual police officers and their governing units. In addition, we find the remedial purposes of § 1983 well served by the inclusion of negligently caused errors. The fact that such constitutional errors will, for the most part, be rectified somewhere along the line does not in itself provide a remedy for the damage which the error may cause, rather it merely prevents the error from becoming even more serious. The fact that the grand jury failed to return an indictment of the Briggs does not undo the arrest nor repair the damaged psyches and reputations of these plaintiffs. The absolute judicial immunity of the magistrate precludes suit against him or her. Were we to permit the interposition of the magistrate between the police officer and the warrant to immunize the negligence of the police officer, such plaintiffs would be remediless.

We find our reasoning here supported by a parallel fourth amendment analysis of the Supreme Court in *United States v. Leon*, — U.S. —, 104 S.Ct. 3405, in which the Court adopted the *Harlow* reasonableness standard to determine when police conduct required suppression of evidence. The Court indicated that where a warrant is obtained upon the basis of an affidavit which the obtaining officer had no reasonable ground to believe alleged probable cause, the resulting search will not be cured by either the magistrate's approval or the ignorance of the executing officers and the evidence will be suppressed. *Leon*, — U.S. at ——— & n. 23-24, 104 S.Ct. at 3421-23 & n. 23-24. The Court's adoption of the *Harlow* standard for suppression appears to mean that "in all cases in which its 'good faith' exception to the exclusionary rule would operate, there will also be immunity from civil damages." *Id.* 104 S.Ct. at 3456 n. 35 (Stevens, J., dissenting). Thus, since suppression will be appropriate where the obtaining officer should have known there was no probable cause, liability of the obtaining officer will also be appropriate.

We believe the foregoing disposes of the Fifth Circuit's "chain of causation" approach as well. *Rodriquez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 894, 54 L.Ed.2d 799 (1978); *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir.) *cert. denied*, 459 U.S. 1005, 103 S.Ct. 361, 74 L.Ed.2d 397 (1982). Despite the fact that this approach is couched in terms of a principle of causality, we find that at bottom it rests upon the same concerns with culpability and immunity already discussed above. The "chain of causation" theory does not withstand scrutiny. If we use the tort concept of "but

for" cause to determine when a causal connection is present, it seems clear that "but for" the police officer's submission of the warrant to the magistrate, the warrant would not issue and the search or arrest would not occur. It is the decision of the police officer to bring the matter to the magistrate that is the active cause of the search or arrest. Where that decision is the result of negligence, *i.e.,* failure to exercise a modicum of judgment about the presence of probable cause, that negligence is the cause of the improper search or arrest.

[5, 6] We conclude, therefore, that our previous cases, *Madison v. Manter,* 441 F.2d 537 (1st Cir. 1971), and *Stadium Films, Inc. v. Baillargeon,* 542 F.2d 577 (1st Cir. 1976), are no longer controlling. We now rule that judicial approval of a warrant cannot serve as an absolute bar to the § 1983 liability of the officer who obtained the warrant. We emphasize, however, that liability does not attach simply because there is a later determination of no probable cause. Applying the standard of official immunity enunciated in *Harlow,* we hold that *only* where an officer is "constitutionally negligent," that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause, will liability attach. Where the sufficiency of the facts fall into the grey area appropriate for judicial determination, submission of the affidavit to a magistrate will insulate the officer from liability. We find, therefore, that the district court improperly directed a verdict for Corporal Malley.

Reversed and remanded for a new trial.

ALDRICH, Senior Circuit Judge (concurring).

I do not share the court's view that *United States v. Leon,* — U.S. —, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), merely assists us, rather than disposes of the present question out of hand. *Leon,* in effect, based the exclusionary rule upon a principle of penalizing the officer for his "official misconduct" (*cf.* "bad faith," *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). By this is meant an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown v. Illinois,* 422 U.S. 590, at 610-611, 95 S.Ct. 2254, at 2265, 45 L.Ed.2d 416 (1975) (Powell, Jr., concurring in part) quoted in *Leon,* — U.S. at —, 104 S.Ct. at 3423. The Court held that such conduct is not cured by the magistrate's acceptance of the affidavit,* even as against a defendant guilty of unlawful possession. I see no room for argument that the magistrate's action would relieve the officer who cannot be said to have acted in objective good faith vis-a-vis an innocent arrestee. Footnote 35 of Justice Stevens' dissent in *Leon* indicating equivalency, quoted in the court's opinion herein, evoked no response from his brethren, and I can read it only as a noting of inevitable consequences, not as a disputation.

So far as "chill" is concerned, it is already clear that an officer's unreasonable conclusion of probable cause can lead to personal liability. *Cf. Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29

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* "[O]ur good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal *despite the Magistrate's authorization.*" *Leon,* n. 23. (Emphasis suppl.).

L.Ed.2d 619 (1971). While the reasons for, and loss of, qualified privilege with respect to professional conduct by the high executive officials in *Harlow v. Fitzgerald*, ante, and the lowly police officers in *Leon* are not "perfectly analogous," *Leon*, n. 22, I can have no doubt but that the Court would apply the same general principles of liability and immunity. *Hobson v. Wilson*, 737 F.2d 1, 25 (D.C. Cir. 1984). The magistrate's acting upon the affidavit might be admissible as expert evidence of its reasonableness, *cf. Leon*, n. 23 (last sentence), but it cannot remove impropriety.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Docket No. C.A. 81-0577

Providence, Rhode Island

February 2, 1984

JAMES BRIGGS
LOUISA BRIGGS

Plaintiffs

v.

STATE OF RHODE ISLAND
EDWARD MALLEY

Defendants

TRANSCRIPT OF DECISION

BEFORE THE HONORABLE RAYMOND J. PETTINE,
SENIOR JUDGE, and a jury

TRANSCRIPT ORDERED BY: FAITH LASALLE,
ATTORNEY AT LAW (ATT. GEN.)

APPEARANCES:	Decof & Grimm By: John Foley, Esquire
For the Plaintiffs:	One Smith Street Providence, Rhode Island
For the Defendants:	Department of the Attorney General Faith LaSalle, Attorney at Law 72 Pine Street Providence, Rhode Island
	Department of the Attorney General Charles DiLeva, Esquire 72 Pine Street Providence, R.I.
Court Reporter:	Joseph A. Fontes 201 Federal Building Providence, Rhode Island

(Filed February 15, 1984)

ORDER

(As delivered orally in open court and quoted herein)

FEBRUARY 2, 1984—AFTERNOON SESSION

(Jury is absent)

THE COURT: Well, I'm ready to rule on this motion. I just want the parties to rest assured that I just exhausted every authority that I could lay my hands on, and had endless discussions on the point. This is not a case that can be decided in this court, there's just no question about it. It's an issue of law that has to be decided, ultimately, by the Circuit Court of Appeals. And what they will do of course remains to be seen if the case is appealed. I normally would reserve decision and let the case go to a conclusion and then make a ruling. But, since this has only been a one day trial, I see no value in doing that. There have been no out of state witnesses, no expert testimony, nothing of that kind that in any way just pyramids costs. Here it was a very direct case and it was presented within a day, so I think I would be rather unfair if I didn't rule on this issue as it now stands before me and as I understand the law.

So, this is my ruling. In *Stadium Films, Inc. v. Baillageron,* 542 F. 2d 577, the First Circuit (1976), the First Circuit used broad language to uphold my dismissal of another Section 1983 based on Search and Seizure under an invalid warrant.

> "To the extent that plaintiff's evidence was directed at establishing that the defendants should have known that the warrants were constitutionally inadequate, it was irrelevant. Under the prevailing view in this country, a peace officer may not be held liable in damages for making negligent errors of law in seeking or

executing a search warrant. See, *Madison v. Manta,* 441 F.2d, 537-538, First Circuit, (1971), and cases cited. See also, *Scott v. Dolaheight,* 54 Federal Rules Decisions, 430 at 434, Northern District of Mississippi, (1972). See *F. United States* versus *Barker,* 44 United States Law Week, 2545 D.C. Circuit, (May 17, 1976.)"

A mistake of law in relying on a Magistrate's Approval of a search warrant can be considered virtually, per se, reasonable. Since Rhode Island Law is in accord with the prevailing rule, See *Atkinson* versus *Birmingham,* 44 R.I., 123, 116 Atlantic 205, (1922), defendants are immuned from liability and damages even if they should have known that the warrants were insufficient, *Madison* versus *Manta,* supra at 538. See *Pierson* versus *Ray,* 386 U.S. 547, 87 Supreme Court 1213, 18 Lawyer's Edition 2d, 288 (1967). See *F. Wood* versus *Strickland,* 420 U.S. 308, 95 Supreme Court, 992, 43 Lawyer's Edition 2d, 214 (1975) 542 Fed. 2d at 578.

"Although an argument may be made that this decision rests ultimately on the line of good faith immunity cases recently changed by *Hollow* versus *Fitzgerald,* 102 Supreme Court 2727, (1982)."

An examination of *Stadium Films,* leads me to the conclusion that although it draws some support from the older good faith immunity cases, such as *Pierson v. Ray,* 386 U.S. 547 (1967), it ultimately rests on a line of reasoning similar to that of the Fifth Circuit in *Smith v. Gonsalves,* 670 Fed. 2d 522, Fifth Circuit, (1982). Even if my conclusion about the source of the logic of Stadium Films is in error, I would feel compelled to follow the Fifth Circuit in *Smith v. Gonsalves.* In Smith, the court compared the facts of that case to its earlier case of, *Rodriguez v. Ritchey,* 556 Fed. 2d, 1185, Fifth Circuit, (1977).

In the court's words:

"We stated in Rodriguez that if the facts supporting an arrest are put before an intermediary, such as a Magistrate or Grand Jury, the intermediary's decision to issue a warrant or return an indictment, breaks the causal chain and insulates the initiating party. 556 Fed. 2d 1193. Here, the defendant arranged to have the witness tell her story directly to an Assistant District Attorney who then filed the affidavit resulting in the issuance of the arrest warrant by the Judge. Because the witness personally appeared before the Assistant District Attorney, the defendant police officer's good faith belief in her truthfulness, and thus the existence in his own mind of probable cause became irrelevant. Rather, it first became the Assistant District Attorney's duty, having had his own first-hand encounter with the person complaining, and then the Judge's duty, when he read the affidavit, to make their own inquiry and the determination as to whether an affidavit should be made, or whether there was probable cause to arrest Smith based on the witness' statement. A reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers, all of whom may be entirely consistent with due process of law. *Baker v. McCullen,* 99 Supreme Court at 2695. The independent decisions of these intermediaries broke the causal chain between the defendant and any constitutional violation. 670 Fed. 2d at 526."

As the Fifth Circuit Panel concluded on this point:

"Once a warrant is issued or probable cause comes into existence, it becomes an officer's duty to arrest the suspect, regardless of his personal feelings, good or ill, towards the suspect."

Perry v. Jones, 506 Fed. 2d, 778, 780, Fifth Circuit (1974).

"A Policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty

> if he does not arrest when he has probable cause or a warrant, and being mulcted in damages if he does."

Turner v. Raynes, 611 Fed. 2d, 92 at 93, Fifth Circuit (1980). Citing *Pierson v. Ray,* 386 U.S. 547, 555, 87 Supreme Court 1213, 1218, 18 Lawyer's Edition 2d, 288, (1967), 670 Fed. 2d at 527.

I emphasize certain portions of the language; that would be the part starting with: ". . . A policeman's lot . . ." right down to: ". . . in damages if he does." And that ends the quote.

I, therefore, must grant defendant Malley's motion for a directed verdict on the constitutional claims. Since the Federal Claim is dismissed, I hereby dismiss the pendent State Claim as well.

That's the Order of this Court.

I don't know what to say, Mr. Foley. You certainly have given some very substantial argument. And it may be that the Appellate Court will clear up this point of law. But, I'm obliged to, regardless of any other reason, I'm obliged to apply it as I interpret it.

MR. FOLEY: Thank you, your Honor.

* * *

CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joseph A. Fontes
(Court Reporter)

2-15-84
(Date)

APPENDIX C

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 81-0577 P

JAMES R. BRIGGS, et al.

v.

EDWARD MALLEY, et al

OPINION AND ORDER

The plaintiffs in this action have moved the Court to grant them a new trial or, in the alternative, for relief from the judgment entered in this action on February 28, 1984 as to their claims against defendant Malley. The reason for this motion is the First Circuit's recent decision in *B.C.R. Transport Co. v. Fontaine,* 727 F.2d 7 (1st Cir. 1984).

The Court's previous decision, which was rendered from the bench on February 2, 1984, rested on the application of two lines of cases: first, the First Circuit's decisions in *Stadium Films, Inc. v. Baillargeon,* 542 F.2d 577 (1st Cir. 1976), and *Madison v. Manter,* 441 F.2d 537 (1st Cir. 1971), and second, the Fifth Circuit's decisions in *Smith v. Gonzales,* 670 F.2d 522 (5th Cir. 1982), and *Rodriguez v. Ritchey,* 556 F.2d 1185 (5th Cir. 1977). Although the Court noted that it could not be totally certain whether *Madison* and *Stadium Films* rested ultimately on the "good faith" or qualified immunity of *Harlow v. Fitzgerald,* 457 U.S. 800, 818-19, 102 S.Ct. 2727, 2738-39 (1982), or on an-

other notion of immunity, privilege, or public policy which limits the liability which attaches to searches or arrests made pursuant to a warrant obtained in good faith, but negligently, the Court ruled that it would read them as resting upon the latter notion and applied them accordingly. In *Madison,* the court summarized the issue presented and its holding as follows:

> The question, accordingly, is whether negligent conduct, often sufficient to create tort liability, and hence to support section 1983 actions, Whirl v. Kern, 5 Cir., 1969, 407 F.2d 781, cert. denied 396 U.S. 901, 90 S.Ct. 210, 24 L.Ed.2d 177; *cf.* Monroe v. Pape, 1961, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed. 2d 492, should not have that effect for reasons of policy, in the case of a police officer applying for a warrant.
>
> . . . A police officer has a much larger public to protect than the individual who, in good faith, he suspects of a crime. He, too, may be discouraged from seeking warrants if the cost is a suit for negligence. The individual who is the object of a warrant has a more single-minded protector—the official whose duty it is to screen the application before issuing the warrant. This is the very purpose of the warrant procedure. It must be enough. We decline to place upon policemen acting in good faith the risk of personal liability if that official makes a negligent mistake.
>
> 441 F.2d at 538-39.

In *Stadium Films,* that court held:

> To the extent that plaintiffs' evidence was directed at establishing that defendants "should have known" that the warrants were constitutionally inadequate, it was relevant. Under the prevailing view in this country, a peace officer may not be held liable in damages for making negligent errors of law in seeking or executing a search warrant. *See Madison v. Manter,* 441 F.2d 537, 538 (1st Cir. 1971) and cases cited.

See also Scott v. Dollahite, 54 F.R.D. 430, 434 (N.D. Miss. 1972); *cf. United States v. Barker,* 44 U.S.L.W. 2545 (D.C. Cir. May 17, 1976). ([A] mistake of [law] in relying on a magistrate's approval of a search [warrant] can be considered virtually per se reasonable.). Since Rhode Island law is in accord with the prevailing rule, *see Atkinson v. Birmingham,* 44 R.I. 123, 116 A. 205 (1922), defendants are immune from liability in damages even if they should have known that the warrants were insufficient. *Madison v. Manter, supra* at 538. *See Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *cf. Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

542 F.2d at 578.

Stadium Films is less clear, but the language quoted from *Madison* implies strongly that the basis of decision was not mere qualified immunity, but rather a different notion which protects a police officer who has conscientiously sought a warrant from a neutral magistrate. Although the previous opinion did not note this, even under *Harlow v. Fitzgerald's* reasoning it may be reasonable for a policeman who believes that the facts in his affidavit are true to defer to a judicial determination that those facts constitute probable cause, thereby allowing him immunity from liability.

Additionally, the February 2 opinion relied on the reasoning of the Fifth Circuit in *Smith, supra,* and *Rodriguez, supra.* In *Smith,* the Fifth Circuit reaffirmed its rule that "if the facts supporting an arrest are put before an intermediary such as a magistrate or grand jury, the intermediary's decision to issue a warrant or return an indictment breaks the causal chain and insulates the initi-

ating party." 670 F.2d at 526 (citing *Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977)).

After reconsidering the application of *Stadium Films*, *Madison*, *Smith*, and *Rodriguez* to this case, the Court reaffirms its previous ruling. Although it is true that consideration of the logic of any of these cases would have mandated a different result in the First Circuit's recent decision in *B.C.R. Transport*, *supra*, it does not appear that these arguments were raised in that case. In *B.C.R. Transport*, the two holdings which are relevant here were: 1) probable cause does not exist per se because the information comes from a person claiming to be a crime victim; and 2) the qualified immunity of *Harlow v. Fitzgerald*, *supra*, is not automatically obtained upon a showing that an officer acted upon information from an alleged victim. 727 F.2d at 10. These two points are beyond dispute—however, neither addresses the arguments made by the defendant in the instant case. The plaintiffs point out that in footnote one of *B.C.R. Transport* the court wrote:

> In this connection we find it disingenuous on Fontaine's part to suggest that since the magistrate issued the warrants, this judicial imprimatur is an impregnable shield against any attack on the sufficiency of the underlying affidavit. This is unquestionable bootstrapping. *See Aguilar v. Texas*, 378 U.S. 108, 111, 84 S.Ct. 1509, 1512, 12 L.Ed.2d 723 (1964) ("Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate . . . not serve merely as a rubber stamp for the police").
>
> 727 F.2d at 10 n.1.

Aguilar, however, was a criminal case discussing probable cause, not a §1983 case on liability. The fact that

a warrant is issued never insulates a lack of probable cause, and the criminal defendant is always free to challenge the legality of a warrant. The point in the instant case, however, is that even though a neutral magistrate's approval of a warrant application does not create probable cause where there is none, it may absolve the applicant policeman from liability because of either public policy or because the magistrate's action breaks the chain of causation.

Therefore, since *B.C.R. Transport* addresses neither the Court's interpretation of *Madison* and *Stadium Films* nor the break in the chain of causation theory of *Smith* and *Rodriguez,* and since, after reconsideration, the Court still finds the reasoning of these cases persuasive, the plaintiffs' motion for a new trial or, in the alternative, for relief from the judgment entered on February 28, 1984, is hereby DENIED.

So ordered.

By Order,

/s/ Concetta R. Zinni
Deputy Clerk

Enter:

/s/ Raymond J. Pettine
Senior Judge

May 14, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1449

JAMES R. BRIGGS AND LOUISA BRIGGS,

Plaintiffs, Appellants,

v.

EDWARD MALLEY, ET AL.,

Defendants, Appellees.

JUDGMENT

November 19, 1984

This cause came on to be heard on appeal from the United States District Court for the District of RHODE ISLAND, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: That part of the District Court judgment only as to Edward Malley is vacated and the cause is remanded to the District Court for a new trial consistent with the opinion filed this day.

By the Court:
Francis P. Scigliano

Clerk.

[cc: Mr. Foley & Ms. LaSalle]

Office-Supreme Court, U.S.
FILED
MAY 8 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1586

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD MALLEY AND THE STATE OF RHODE ISLAND,
Petitioners,

VS.

JAMES R. BRIGGS AND LOUISA BRIGGS,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a police officer who charges a person with the commission of a crime and who requests that a judge issue a warrant for the arrest of that person, all under facts which provide no reasonable grounds for concluding that probable cause exists, is nevertheless immunized from liability under 42 U.S.C. §1983 if the judge issues the requested warrant.

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In The

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1586

EDWARD MALLY AND
THE STATE OF RHODE ISLAND,

Petitioners,

VS.

JAMES R. BRIGGS AND LOUISA BRIGGS,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court
Of Appeals For The First Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents James R. Briggs and Louisa Briggs submit that the Petition for Writ of Certiorari should be denied. Respondents concur in petitioner's statements under the headings OPINIONS BELOW, JURISDICTIONAL GROUNDS, and CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED in the Petition. The Appendix to the petition (hereinafter "Pet. App.") is incorporated herein by reference.

STATEMENT OF THE CASE

Respondents James Briggs and Louisa Briggs are husband and wife. They are long-time residents of the Town of Narragansett, Rhode Island, having lived there for over thirty years. Mr. Briggs is a real estate developer and has served eight years as the elected tax assessor of Narragansett. He has been active in community affairs as well, having served as the chairman for the heart fund and muscular dystrophy drives and as the president of the Narragansett Chamber of Commerce. Both Mr. and Mrs. Briggs enjoyed a good reputation in the community and neither has ever had any involvement with illegal drugs.

On December 20, 1980, Rhode Island State Police intercepted a telephone call on a court-authorized wiretap in connection with a narcotics investigation of one Paul Driscoll, who was a friend of respondents' daughter. The call was overheard by Joseph Miranda of the Rhode Island State Police, who noted the substance of the conversation on a call log sheet. The call log sheet states that the caller identified himself as "Dr. Shogun" and that there was a general conversation about a party the preceding night. In the words of officer Miranda, "caller says I can't believe I was token [sic] in front of Jimmy Briggs—caller states he passed it to Louisa—caller and Paul talk about another party going down tonight—Paul says Nancy was sitting in his lap rolling her thing . . . ."

The investigation of Paul Driscoll was being directed by petitioner Edward Malley. Malley was not present when the call from "Dr. Shogun" was intercepted, but discussed the call shortly after with detective Ronald Youngsma, who was working with Malley on the investigation. They determined that the call was in fact an incriminating call because "token" is drug parlance for smoking marijuana and because the

phrase "rolling her thing" meant rolling a marijuana cigarette.

Solely on the basis of the conversation of December 19, 1980, Malley concluded that James and Louisa Briggs had committed the crime of conspiracy to possess marijuana with intent to deliver. Malley then prepared an Affidavit and Arrest Warrant form and a District Court Felony Complaint form for Mr. and Mrs. Briggs. The printed form of the Affidavit and Arrest Warrant for James Briggs stated that "Your affiant upon oath states that he has reason to believe and does believe that grounds for issuance of an arrest warrant exists and states the following facts on which such belief is founded." Malley then typed an affidavit in which he described the substance of the December 20 call as recorded by officer Miranda and his understanding of the meaning of the drug terminology used. He concluded the affidavit with the statement, "Therefore, your affiant requests that an arrest warrant be issued for James R. Briggs, alias John Doe . . . " A similar form was completed for Louisa Briggs. Malley signed each form as "affiant."

The District Court Felony Complaint forms listed the Rhode Island State Police as "complainant." The printed portion of the form stated, " . . . The here named complainant on oath, in the name and behalf of the State, says that the here named defendant . . . on the date stated with force and arms acted in violation of law and wherefore the complainant prays that a summons or arrest warrant may issue . . . " Malley then typed in the specific charges against Mr. and Mrs. Briggs and signed the complaint as "authorized officer."

After preparing the affidavits and court forms, Malley then appeared before a judge of the Rhode Island District Court, on February 25, 1981, who issued arrest warrants

for Mr. and Mrs. Briggs, as well as twenty other individuals. Respondents were arrested in their home in the early morning hours of March 19, 1981 and held at a State Police barracks until that afternoon when they were arraigned and released from custody. The grand jury which considered the charges against Mr. and Mrs. Briggs returned no true bill.

Respondents concur with petitioner's statement as to the procedural history of this case.

REASONS FOR DENYING THE WRIT

The petition should be denied because the Court of Appeals correctly applied the principles announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *United States v. Leon*, ___ U.S. ___, 104 S.Ct. 3405 (1984) to conclude that a police officer who applies for and obtains an arrest warrant on the basis of facts which no reasonable officer could believe provided probable cause may be liable for damages under 42 U.S.C. §1983. The petition also should be denied because there is no conflict among the circuits over the applicability of the principles of *Harlow* and *Leon* to an arrest-pursuant-to-warrant case under §1983. Since the principles announced in *Harlow* and *Leon* have settled the question presented for review, review by this Court is unnecessary.

I. The Court of Appeals correctly applied settled principles of good faith immunity to the facts of this case.

In reversing the trial judge's grant of a directed verdict in favor of petitioner Malley, the Court of Appeals applied the good faith immunity principles announced by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Court of Appeals held "that *only* where an officer is 'constitutionally negligent', that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause, will liability attach." *Briggs v. Malley*, 748 F.2d 715, 721 (1st Cir. 1984) (emphasis in original) (Pet. App. 16). This

is a straight-forward and correct application of this Court's pronouncement "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. at 818. There is nothing remarkable or objectionable about this analysis that would warrant review by this Court.

The Court of Appeals correctly found further support for its holding from *United States v. Leon*, ___ U.S. ___, 104 S.Ct. 3405 (1984).[1] There, this Court established a good-faith exception to the exclusionary rule and cited *Harlow* for the proposition that a police officer must act in an objectively reasonable manner in relying on a magistrate's finding of probable cause in order to invoke the good faith exception. *United States v. Leon*, ___ U.S. at ___, 104 S.Ct. at 3421. Mr. Justice Stevens, dissenting, noted the majority's recognition of the equivalence between the availability of a good faith exception to the exclusionary rule and a good faith immunity from civil damage suits. *Id.*, ___ U.S. at ___, n. 35, 104 S.Ct. 3456 n. 35. Thus, *Leon* recognizes the applicability of *Harlow's* immunity principles to damages suits arising out of arrests pursuant to warrants. *Leon's* instruction in this regard was noted by the Court of Appeals below and the *Harlow* immunity principles were correctly applied.

Petitioner's contention that *Harlow* was incorrectly applied below, as well as his argument that the holding below conflicts with the traditional division of functions between

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[1]Petitioner fails to recognize the importance of *United States v. Leon*, citing it only for the proposition that an officer who misleads a magistrate or displays a reckless disregard for the truth may face civil liability (Petition at 12, n.5).

police and magistrates, are premised on a mischaracterization of the facts. Petitioner repeatedly characterizes his conduct as a disinterested presentation of evidence to a judge, who bore complete responsibility for the evaluation of probable cause and the issuance of the warrant. As seen from the documents he prepared, however, petitioner did not simply gather evidence and present it to a magistrate for a determination of probable cause. Rather, at the close of his investigation he concluded that respondents had committed a crime, signed a felony complaint against them, and requested that the magistrate issue a warrant for their arrest. He actively sought the arrest of respondents; his actions were purposeful and accusatory, not dispassionate or indifferent. Thus, it is not the mere presentation of evidence to a magistrate which is constitutionally offensive here. It is petitioner's conclusion that respondents had committed a crime and his active role in initiating charges against them and seeking their arrest, when probable cause was entirely lacking, which is actionable. Under the facts of this case,[2] *Harlow* was correctly applied below.

Neither did the decision below alter in any way the traditional division between police and magisterial functions. Nothing in the opinion below suggests that police officers need no longer apply to judges or magistrates for warrants in appropriate cases. The opinion below stands only for the proposition that a police officer may be liable in damages if he applies for and obtains an arrest warrant under circumstances where no reasonable police officer would conclude that probable cause exists. He will not be insulated from

---

[2]To the extent that a decision by this Court will turn on the particular facts of the case regarding the statements made by Malley in signing the complaint and warrant forms, the decision will lack any broad application and review by writ of certiorari would be particularly inappropriate.

liability simply because the magistrate joins in the error by issuing the warrant requested by the officer.

Contrary to petitioner's assertion, the ruling below does not transfer the magistrate's duties to the police officer. What the holding does is require the police officer to act in an objectively reasonable fashion by not instituting criminal charges or applying for an arrest warrant unless there is a factual basis for doing so. While this rule may require a police officer to be more diligent, and may result in fewer arrests without probable cause, it will not transfer or lessen the duty of the magistrate or judge to carefully screen warrant applications. Rather than confusing the functional division between police and magistrates, the holding below simply provides a disincentive for the police to be lax in their duty not to initiate criminal proceedings and seek arrest warrants in the absence of probable cause.

Petitioner also incorrectly argues that the "grey area" where immunity will apply, *Briggs v. Malley*, 748 F.2d at 721 (Pet. App. 16), is an illusion. The "grey area" referred to by the Court of Appeals is simply those situations where reasonable minds could disagree as to whether probable cause existed. Under *Harlow*, if an officer brings criminal charges and requests issuance of a warrant under facts which could reasonably be believed to constitute probable cause, he will be immune from liability. Only unreasonable conduct will be actionable. While the civil trier of fact[3] in an action under 42 U.S.C. §1983 will have the final say on whether the officer's conduct was objectively reasonable, the careful preparation

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[3]The Court of Appeals' analysis lends itself to summary disposition of groundless civil rights actions. *See Butz v. Economou*, 438 U.S. 478, 507-508 (1978). Where the facts indisputably show that reasonable minds could conclude that probable cause existed, the officer's objectively reasonable conduct will entitle him to summary judgment. *See Fullman v. Graddick*, 739 F.2d 553, 561 (11th Cir. 1984).

of affidavits by police, with attention to Fourth Amendment standards, will virtually guarantee good faith immunity.

II. There is no present conflict among the circuits regarding the immunity of police officers whose defective warrant applications are approved by magistrates.

Petitioner has cited seven decisions, from four Circuit Courts of Appeals, in support of his argument that the decision below conflicts with the so-called "chain-of-causation" principles discussed in those cases. All of the cases cited, however, predate *United States v. Leon* and all but one of the cases[4] predate *Harlow v. Fitzgerald*. Since *Harlow* and *Leon* have provided clear instruction to the Courts of Appeals on the question presented for review by the instant petition, and because the decisions of the Courts of Appeals which post-date *Harlow* and *Leon* are consistent, no conflict warranting review by this Court presently exists.

In *Leon*, this Court stated that "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal *despite the magistrate's authorization.*" *United States v. Leon*, ___ U.S. at ___, n. 23, 104 S.Ct. at 3421, n. 23 (emphasis added). Thus, the judicial issuance of the warrant is not dispositive on the question of the good-faith exception to the exclusionary rule. Given the parallel recognized by this Court between the *Leon* inquiry and the *Harlow* immunity standard, it is clear from *Leon* that there can be no hard and fast rule insulating a police officer from liability whenever a judge approves a warrant application, no matter how unreasonable the officer's conduct. Therefore, *Leon* has put to rest the illogical chain of causation

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[4]*McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982).

doctrine and resolved the pre-existing conflict[5] in the Circuits regarding this doctrine.

Since *Leon*, the Courts of Appeals which have considered police liability for arrests pursuant to warrants have rejected or ignored the chain of causation doctrine and have instead applied the principles of *Harlow* and *Leon*. Both the court below and the Fourth Circuit in *Fullman v. Graddick*, 739 F.2d 553 (11th Cir. 1984) found *Leon* applicable to §1983 actions for damages alleging an arrest based on a warrant issued without probable cause. The court below ruled that the district court's grant of a directed verdict was improper, whereas the Eleventh Circuit in *Fullman* held, with respect to one defendant, that summary judgment for that defendant was proper, citing *Leon*, since "the warrants were facially valid, and the uncontroverted facts show that the arrest warrant was executed in good faith and with probable cause." *Id.* at 561. The chain of causation doctrine was not mentioned in *Fullman* and was rejected by the court below.[6]

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[5]The scope and applicability of the doctrine is open to serious question, even in the Circuit which created it. In *Rodriguez v. Ritchey*, 556 F.2d 1185 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 1047 (1978), the doctrine was fully accepted by only the five-judge plurality; the two judges who concurred in the result and the six dissenters rejected the doctrine in whole or in part. Moreover, in the cases the doctrine is usually *dictum*, being mentioned in passing as a further reason supporting a result already reached. *See McSurely v. McClellan*, 697 F.2d at 323-24; *Garris v. Rowland*, 678 F.2d 1264, 1273 n. 6 (5th Cir.), *cert. denied sub nom. Ft. Worth v. Garris*, 459 U.S. 864 (1982); *Ames v. United States*, 600 F.2d 183 (8th Cir. 1979).

[6]The First Circuit correctly noted that as a principle of causation the doctrine could not withstand analysis because it contradicts the settled tort notion of "but for" cause. 748 F.2d at 721 (Pet. App. 15-16). This rejection of the chain of causation doctrine is consistent with this court's often-cited declaration that §1983 "should be read

Since it is the post-*Harlow* and *Leon* landscape which should be surveyed to determine whether there is a conflict among the circuits, and since the two post-*Harlow* and *Leon* decisions in this area are consistent, no conflict presently exists warranting review by this Court.

CONCLUSION

Because the Court of Appeals correctly based its decision on the principles announced in *Harlow* and *Leon* and because there is uniformity, not conflict, in the courts of appeals which have applied *Harlow* and *Leon* to arrest warrant damages cases, this Court should decline to review the decision of the Court of Appeals.

Respectfully submitted,

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against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

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ALEXANDER L. STEVAS,
CLERK

(6)

No. 84-1586

In The
Supreme Court of the United States
October Term, 1984

EDWARD MALLEY AND
THE STATE OF RHODE ISLAND,

Petitioners,

vs.

JAMES R. BRIGGS AND
LOUISA BRIGGS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 5, 1985
CERTIORARI GRANTED MAY 28, 1985

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 18, 1981—Complaint filed.

November 25, 1981—Defendant Edward Malley's Answer filed.

February 1, 1984—Jury trial of action commenced.

February 2, 1984—Defendant State of Rhode Island's Motion to Dismiss granted; Defendant Malley's Motion to Dismiss granted.

February 28, 1984—Judgment entered for defendants Edward Malley and the State of Rhode Island.

March 8, 1984—Plaintiffs' Motion for New Trial or for Relief From Judgment filed.

March 19, 1984—Defendant's Objection to Plaintiffs' Motion for New Trial or for Relief from Judgment Filed.

May 15, 1984—Opinion and Order: Plaintiff's Motion for New Trial or for Relief from Judgment is denied.

May 23, 1984—Plaintiffs' Notice of Appeal filed.

November 19, 1984—Opinion and Judgment of the United States Court of Appeals for the First Circuit.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CA81 - 0577 P

JAMES R. BRIGGS and LOUISA BRIGGS

vs.

EDWARD MALLEY and the STATE
OF RHODE ISLAND

Plaintiffs hereby demand trial by jury

COMPLAINT

JURISDICTION

1. This action arises under the Fourth and Fourteenth Amendments to the Constitution of the United States and under 42 U.S.C. § 1983. Jurisdiction is vested in this Court by virtue of 28 U.S.C. § 1343(3).

2. Jurisdiction over Counts III, IV, and V is vested in this Court by virtue of the doctrine of pendent jurisdiction.

PARTIES

1. Plaintiff James R. Briggs is a resident of the Town of Narragansett, State of Rhode Island.

2. Plaintiff Louisa B. Briggs is a resident of the Town of Narragansett, State of Rhode Island.

3. Defendant Edward Malley is a resident of the State of Rhode Island and is and was at all times mentioned herein a member of the Rhode Island State Police. He is sued individually and in his official capacity.

4. Defendant State of Rhode Island is a sovereign State of the United States of America and is susceptible to suit in this action under the provisions of R.I.G.L. § 9-1-31.

COUNT I

1. On or about February 25, 1981, defendant Edward Malley applied to the District Court of the State of Rhode Island for warrants for the arrest of plaintiffs James R. Briggs and Louisa Briggs, which warrants were issued on or about February 25, 1981.

2. These arrest warrants were constitutionally deficient in that the affidavits submitted in support of the application did not set forth sufficient facts to establish probable cause to believe that plaintiffs had committed the offense alleged in the warrant application or felony complaint.

3. Defendant Edward Malley knew, at the time he applied for the warrants for the arrest of plaintiffs, that the affidavits submitted in support of the application did not set forth sufficient facts to establish probable cause to believe that plaintiffs had committed the offense alleged in the warrant application or felony complaint.

4. The actions of defendant Edward Malley in applying for warrants for the arrest of plaintiffs, in spite of his knowledge of the legal insufficiencies of the affidavits, were taken maliciously, in bad faith, and in reckless disregard for the rights of plaintiffs.

5. As a direct and proximate result of the defendant Edward Malley's actions, plaintiffs were arrested on March 19, 1981, pursuant to the arrest warrant obtained

by defendant Malley, and charged with violations of R.I. G.L. § 21-28-4.08, all in violation of plaintiffs' rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

6. The criminal charges against plaintiffs stemming for [sic] their arrest on March 19, 1981, have been dismissed, the grand jury which considered the charges against plaintiffs having returned no true bill against plaintiffs.

7. As a direct and proximate result of the actions of Defendant Edward Malley, Plaintiffs James R. Briggs and Louisa B. Briggs were unlawfully arrested and imprisoned, suffered severe and permanent injuries to their bodies, nerves and nervous systems and were otherwise injured, were prevented from transacting their business, suffered a loss of wages, had their earning capacity impaired, had their reputation damaged, and suffered great pain of body and mind, humiliation and indignity.

WHEREFORE, Plaintiffs James R. Briggs and Louisa B. Briggs each demand judgment against Defendant Edward Malley for One Million Dollars ($1,000,000) as compensatory damages, plus interest, and One Million Dollars ($1,000,000) as punitive damages, plus costs and attorneys' fees as provided in 42 U.S.C. § 1988.

COUNT II

1. The allegations of Count I are incorporated here as if set forth in full.

2. The actions of defendant Edward Malley in procuring unlawful warrants for the arrests of Plaintiffs James R. Briggs and Louisa Briggs were the result of the

failure of Defendant State of Rhode Island and its police department, over a long period of time prior to February 25, 1981, to establish necessary and adequate training and instruction programs for police officers, and to promulgate and enforce guidelines and manuals concerning the application for arrest warrants.

3. The failures of Defendants State of Rhode Island and its police department as aforesaid were willful, wanton, and in reckless disregard of the rights of plaintiffs.

4. As a direct and proximate result of the actions and failures of Defendant State of Rhode Island, Plaintiffs James R. Briggs and Louisa B. Briggs were unlawfully arrested and imprisoned, suffered severe and permanent injuries to their bodies, nerves and nervous systems and were otherwise injured, were prevented from transacting their business, suffered a loss of wages, had their earning capacity impaired, had their reputation damaged, and suffered great pain of body and mind, humiliation and indignity.

WHEREFORE, Plaintiffs James R. Briggs and Louisa B. Briggs each demand judgment against Defendant State of Rhode Island for One Million Dollars ($1,000,000), plus costs and attorneys' fees as provided in 42 U.S.C. § 1988.

COUNT III

1. The allegations of Count I are incorporated here as if set forth in full.

2. On February 25, 1981, defendant Edward Malley instituted criminal charges against plaintiffs James R. Briggs and Louisa B. Briggs maliciously and in bad faith,

knowing that there was not probable cause to believe that plaintiffs had committed the crimes with which they had been charged.

3. As a result of the institution of criminal charges against plaintiffs, plaintiffs were arrested and required to appear before a judge of the District Court of the State of Rhode Island to defendant [sic] against these charges.

4. The criminal charges instituted against plaintiffs have since been dismissed.

5. As a direct and proximate result of the actions of Defendant Edward Malley, Plaintiffs James R. Briggs and Louisa B. Briggs were unlawfully arrested and imprisoned, suffered severe and permanent injuries to their bodies, nerves and nervous systems and were otherwise injured, were prevented from transacting their business, suffered a loss of wages, had their earning capacity impaired, had their reputation damaged, and suffered great pain of body and mind, humiliation and indignity.

WHEREFORE, Plaintiffs James R. Briggs and Louisa B. Briggs each demand judgment against Defendants Edward Malley and the State of Rhode Island, jointly and severally, in the amount of One Million Dollars ($1,000,000) as compensatory damages, plus interest, and One Million Dollars ($1,000,000) as punitive damages, plus costs.

COUNT IV

1. The allegations of Count I are incorporated here as if set forth in full.

2. On or about February 25, 1981, Defendant Edward Malley published a statement which charged Plain-

tiffs James R. Briggs and Louisa B. Briggs with criminal conduct.

3. The publication of the statement by Defendant Edward Malley was made maliciously, with knowledge of its falsity.

4. As a direct and proximate result of the actions of Defendant Edward Malley, information which implicated plaintiffs in drug trafficking was released to news reporters maliciously and with knowledge of its falsity or in reckless disregard thereof, and with the expectation and desire that the information would be reported throughout Rhode Island. As a result, news reports of the arrest and detention of plaintiffs, which implicated plaintiffs in drug trafficking, were carried on television and in newspapers and otherwise circulated in news reports around Rhode Island.

5. As a result of the publication of this information, plaintiffs were held up to public scorn and ridicule.

6. As a direct and proximate result of the actions of Defendant Edward Malley, Plaintiffs James R. Briggs and Louisa B. Briggs were unlawfully arrested and imprisoned, suffered severe and permanent injuries to their bodies, nerves and nervous systems and were otherwise injured, were prevented from transacting their business, suffered a loss of wages, had their earning capacity impaired, had their reputation damaged, and suffered great pain of body and mind, humiliation and indignity.

WHEREFORE, Plaintiffs James R. Briggs and Louisa B. Briggs each demand judgment against Defendants Edward Malley and the State of Rhode Island, jointly and severally, in the amount of One Million Dollars ($1,000,000)

as compensatory damages, plus interest, and One Million Dollars ($1,000,000) as punitive damages, plus costs.

COUNT V

1. The allegations of Count I are incorporated here as if set forth in full.

2. As a direct and proximate result of the actions of Defendant Edward Malley, plaintiffs were falsely imprisoned, there being no probable cause to believe that plaintiffs had violated the statute under which they were charged.

3. As a direct and proximate result of the actions of Defendant Edward Malley, Plaintiffs James R. Briggs and Louisa B. Briggs were unlawfully arrested and imprisoned, suffered severe and permanent injuries to their bodies, nerves and nervous systems and were otherwise injured, were prevented from transacting their business, suffered a loss of wages, had their earning capacity impaired, had their reputation damaged, and suffered great pain of body and mind, humiliation and indignity.

WHEREFORE, Plaintiffs James R. Briggs and Louisa B. Briggs each demand judgment against Defendants Edward Malley and the State of Rhode Island, jointly and severally, in the amount of One Million Dollars ($1,000,000) as compensatory damages, plus interest, and One Million Dollars ($1,000,000) as punitive damages, plus costs.

James R. Briggs and
Louisa B. Briggs

By their Attorneys,
Decof & Grimm
One Smith Hill
Providence, RI 02903

/s/ Leonard Decof

DATED: September , 1981.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF RHODE ISLAND

C. A. No. 81-0577 P

JAMES R. BRIGGS and LOUISA BRIGGS

vs.

EDWARD MALLEY and
THE STATE OF RHODE ISLAND

ANSWER OF EDWARD MALLEY

Defendant, Edward Malley, states the following in answer to the complaint in the above-entitled action.

First Defense

The Court lacks jurisdiction over the claims against Edward Malley in that the action is, in essence, an action against the State of Rhode Island and therefore, said claim is barred by the Eleventh Amendment to the United States Constitution.

Second Defense

The complaint fails to state a claim upon which relief can be granted, in that the facts alleged do not support a claim under 42 U.S.C. § 1983, nor do they state any claim against the defendant cognizable in a federal forum.

Third Defense

The defendant has absolute immunity and/or the qualified immunity of good faith from this action.

Fourth Defense

1. Defendant denies the allegations contained in paragraphs one and two of that portion of the complaint denominated "Jurisdiction."

2. Paragraphs one, two and three of that portion of the complaint denominated "Parties" characterize the cause of action and therefore, demand no response. Paragraph four of that same section characterizes the cause of action to the extent that it is alleged that "Defendant State of Rhode Island is a sovereign State of the United States of America;" and with respect to the remaining part of that paragraph, the defendant responds that it is without sufficient information to form a belief as to the truth of the allegations.

3. Defendant admits the allegations contained in paragraphs one and six of that part of the complaint denominated Count I.

4. Defendant denies the allegations contained in paragraphs two, three, four, five and seven of that portion of the complaint denominated Count I.

5. Defendant incorporates its answers to the allegations of Count I in answering paragraph one of those portions of the complaint denominated Count II, Count III, Count IV and Count V.

6. Defendant denies the allegations contained in paragraphs two, three, and four of that part of the complaint denominated Count II.

7. Defendant denies the allegations contained in paragraphs two, three and five of that portion of the complaint denominated Count III.

8. Defendant admits the allegations contained in paragraph four of that portion of the complaint denominated Count III.

9. Defendant denies the allegations contained in paragraphs three, four, five and six of that portion of the complaint denominated as Count IV.

10. Paragraph two of that portion of the complaint denominated as Count IV calls for a conclusion of law, and therefore demands no response. If it is determined that it does not call for a conclusion of law, defendant denies the allegations contained therein.

11. Defendant denies the allegations contained in paragraphs two and three of that portion of the complaint denominated as Count V.

WHEREFORE, defendant, Edward Malley, demands judgment in his favor and such further relief as this Court may deem proper.

Edward Malley

By his attorney,
Dennis J. Roberts II
Attorney General

/s/ Faith A. LaSalle
Special Assistant
Attorney General
72 Pine Street
Providence, R.I. 02903

[Certification omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Docket No. C.A. 81-0577

Providence, Rhode Island
February 1, 1984
February 2, 1984

JAMES BRIGGS
LOUISA BRIGGS

Plaintiffs

vs.

STATE OF RHODE ISLAND
EDWARD MALLEY

Defendants

STATE OF RHODE ISLAND
EDWARD MALLEY
TRANSCRIPT OF DECISION
BEFORE THE HONORABLE RAYMOND J. PETTINE,
SENIOR JUDGE, and a jury.

• • • •

[2] JAMES RHODES BRIGGS, SWORN

Direct Examination

BY MR. FOLEY:

Q. Mr. — Where do you live, Mr. Briggs?

A. In Narrangansett, at 15 Carver Lane.

Q. How long have you lived in Narragansett?

A. Since approximately 1950. Before that I lived in South Kingston.

Q. Are you married?

A. Yes, I am.

Q. And is this your wife sitting here in court today?

A. Yes, it is.

Q. You have any children?

A. Four children.

Q. What business are you involved in, Mr. Briggs?

A. I'm in the real estate development business.

• • • •

[3] Q. While you've lived in Narragansett have you held any elected office?

A. Yes, I have.

Q. What was that?

A. I was elected for eight years as a town tax assessor.

Q. Have you been involved in any community organizations?

A. Yes, I have.

Q. What are those?

A. I've been chairman of the Heart Fund drive in Narragansett, chairman of the Multiple Dystrophy drive. I've been president of the Narragansett Chamber of Commerce and also assisted in other fund raising things for charities.

Q. Do you have any involvement with any financial institutions in the area?

A. Yes, I do.

Q. What is that?

A. I'm a director of the Pettaquamscutt Credit Union which is a local bank in Wakefield. and I'm an officer of their organization, secretary of the board.

Q. Do you belong to any social clubs?

[4] A. Yes, we belong to the Dunes Club, we belong to Point Judith Country Club and I belong to the Elks. I was a charter member of the Elks in South Kingston.

Q. Mr. Briggs, do you recall the morning of March 19, 1981?

A. Yes, I do.

Q. Do you recall the events that transpired in the morning?

A. Yes, I do.

Q. What is the first thing you recall about that morning?

A. Well, being awakened at about quarter of six, I would say, in the morning.

Q. And how were you awakened?

A. By a loud knock on the door.

Q. Where is this door in your house with respect to where you were?

A. It was the rear door, the back door of the house.

Q. Is this — is your room located near this door?

A. Fairly near, yes.

Q. What happened after you heard the knock on the door?

A. I jumped out of bed and I put my robe on, and went to the door. I didn't know who it would be at that early in the morning.

Q. What did you see when you got to the door?

A. Several policemen and police cars outside with the red — two Narragansett police cars with the red lights flashing.

[5] Q. Did you recognize any of the police officers that you saw?

A. Yes, I did.

Q. Who did you recognize?

A. Captain Cooke from the Narragansett Police Department. Detective Captain Cooke of the Narragansett Police Department and Sergeant Billy Wall from Narragansett. And Captain O'Donnell from Narragansett Police Department. There also was a state police lieutenant in plain clothes, whom I didn't know.

Q. Have you subsequently found out who that officer was?

A. Yes.

Q. Who was that?

A. A Lieutenant Almberg of the Rhode Island State Police.

Q. Did Lieutenant Almberg say anything to you?

A. Yes, he did. He said I have arrest warrants here for you and your wife.

Q. Did you say anything in return to tht [sic]?

A. I said, What? He said I have arrest warrants here for you and your wife, and I said, there's — I don't — there's got to be a mistake here.

• • • •

[6] Q. What happened next?

A. I invited them in and they said I would have to get my clothes on and —.

• • • •

Q. What did you do after they told you you had to get your clothes on?

A. They said we would have to go up to the Barracks at Wickford.

Q. So after you had your clothes on, what did you do?

A. Oh, I went upstairs and got my — to wake my wife up.

Q. Did you say anything to her?

A. Yes, I said, you have to get your clothes on. We have to take a ride, and she said, a ride? At this time of the morning? And I said yes. And I — sternly I said to her, we have been arrested and we — the police are downstairs and we have to go to the Barracks.

Q. What was her reaction that you observed?

[7] A. She, she couldn't believe it.

• • • •

Q. Did you leave your house with the police officers?

A. Yes.

Q. Where did you go when you left your house?

A. Well, I started to go to my car, I was going — and I said to Lt. Almberg, shall I take my car, and he said no, Jim, you better come with us.

Q. Did you get into his car?

A. Yes.

Q. And was your wife with you?

A. Yes.

Q. Where did you go when you were in the police car?

A. They took us to the Wickford Barracks.

Q. What were you feeling at this time during the ride up to the Wickford Barracks?

A. Well, I was asking questions trying to find out what the [8] — why we were being arrested.

Q. And did you receive any response?

A. Not why they — they just said it was drug related charges.

Q. When you arrived at the Wickford Barracks, what was the first thing that happened?

A. We were brought into a small room and told to wait there.

Q. How long were you in that small room?

A. Probably a half an hour.

Q. What happened next?

A. Then a State Police, I guess he's a fingerprint man, records man, or something for the State Police came in and wanted to know who wanted to be fingerprinted first, me or my wife.

Q. And who went to be fingerprinted first?

A. My wife did.

Q. Did you go — did you subsequently go to have your fingerprints taken?

A. Yes, I did.

Q. Describe what was done? How the fingerprints were taken.

A. Well, they held your hand and dipped it in ink and made prints on a — on a record sheet.

Q. How did you feel while that process was going on?

[9] A. Very humiliated.

Q. After your fingerprints were taken, what happened next?

A. Then they took us into a large room which used to be the three car garage on the Barracks. They use that as an incarceration room.

Q. Do you recall approximately what time it was now? When you were placed in this room?

A. It probably was about quarter of seven or seven o'clock at that time.

Q. Was your wife with you at the time?

A. Yes. Yes, she was.

Q. Did the police have any more procedures to do with respect to you while you were in this room?

A. Yes, they did. They photographed us in the — in this big room with holding numbers in front of us, took side views, group views, front views with this number in front of us.

Q. How did you feel while that process was going on?

A. Very humiliated again. I was — because I was dumbfounded by the whole thing.

Q. Did you have any conversations with anyone while you were in that room? Concerning what was going on?

A. Yes, I talked to a young trooper there.

Q. What did you say to him?

A. I wanted to know why we were being arrested for what, [10] on what charges.

Q. Did you receive any response?

A. No. Just drug related charges, that's all.

Q. How long were you in this garage-type room?

A. We were there until approximately, in my mind, about anywhere two to two-thirty in the afternoon.

Q. And what happened at two or two-thirty in the afternoon?

A. They lined us up and paraded us out through in front of the camermen [sic] and the photographers to get on the bus.

Q. Did you have some conversation with your wife before this happened?

A. Yes, I did.

Q. What did you say to her?

A. I said to her, we haven't done anything wrong, and there's no reason why we shouldn't just walk out there and get on the bus. And then —

Q. Is that —

A. Then I remembered that my father at the time was ninety-five and my mother was ninety-two and they watched the news every night, and if they ever saw us on television being arrested in a drug raid, it could kill either one of them.

Q. So what did you decide to do?

A. We decided to cover our faces with our coats and get on the bus that way.

[11] Q. Could you describe where the bus was located and where the cameramen were located?

A. They had the bus at least, oh, a hundred and fifty feet away or a hundred feet away from the door to the barracks, so that they could get the press all lined up on both sides to run us through the gauntlet.

Q. So you had to walk in between the cameras?

A. Yes. Cameras and troopers both.

Q. And —

A. Who I might say, were harassing us at the time.

MISS LaSALLE: Objection. Unresponsive.

THE COURT: Overruled. Proceed.

Q. What were the troopers saying to you at this time?

A. Well, they were — it was like they were driving cattle through a, through a chute. They were hollering and making — it was very degrading, what they were doing.

Q. After you got on the bus, what happened next? Where did you go?

A. They took us to the West Kingston Courthouse.

Q. And when you got to the West Kingston Courthouse, what happened next, after the bus arrived there?

A. I was supposed to be at the courthouse that morning for a land transaction that was going on that had to go before the court. And Ed Hogan was there at the time to represent me in this land transaction and I —. Am I saying too much?

[12] Q. Had he waited there for you?

A. What's that?

Q. Had Mr. Hogan waited there in court for you?

A. Yes.

Q. Did you see him when you arrived at the courthouse?

A. Yea, I did.

Q. And what happened in getting from the bus to the courthouse?

A. They took some more pictures at the courthouse.

Q. Were these cameramen who were outside the courthouse?

A. Yes. Waiting.

Q. Were you allowed to speak to your lawyer when you arrived at the courthouse?

A. I was, yes. I — he had some papers that I had to sign pertaining to the land transaction, what went on in the court, which I couldn't be there for, and I signed those papers.

* * * *

[13] Q. After you spoke to Mr. Hogan what happened next?

A. We were brought into the courtroom and waited there for our arraignment.

Q. Did the judge come in?

A. Yes, he did.

Q. What happened after the judge came into the courtroom?

A. Individually we were brought before the judge and he read our charges and he asked us how we pleaded.

Q. Do you recall what charges he read that day?

[14] A. I don't really. I was so upset I don't even know what the judge said.

Q. Prior to the judge reading the charges to you, had you been told by anybody anything about your charges other than that they were drug related?

A. No, we had not been told.

Q. Did you make some plea in response to what the judge had read?

A. Either Ed Hogan or I pleaded not guilty, I'm not — I don't even remember. I guess I pleaded not guilty.

Q. What did you do after your not guilty plea?

A. We were sent downstairs to sign for the bond, I guess it was, or something.

Q. When you were downstairs did you see anyone from the State Police?

A. That's the first time I met Officer Malley.

Q. That's the gentleman seated at the defense counsel table with the blue shirt?

A. Yes.

MR. FOLEY: Your Honor, may the record reflect that the witness has identified the defendant, Edward Malley?

THE COURT: It may.

MR. FOLEY: Thank you.

Q. Did you say anything to Officer Malley?

A. Yes, I said, why have you done this to me? We haven't [15] done anything wrong and here you've arrested us. And he said very sarcastically to me, you'll have your day in court.

Q. Was that the end of your conversation with him?

A. Yes, it was.

Q. After that conversation Mr. Briggs, where did you go?

A. Out into the lobby and waited for a ride home.

• • • •

[29] Q. Do you recall, Mr. Briggs, the evening of December 19, 1980?

A. December 19th?

Q. Prior to your arrest?

A. Yes.

Q. Do you recall what you did that evening?

A. Yes. We were invited to a party at some friends of ours house, the Warburton's, and it was a party of local people. There were a good many people there from the area, friends of ours, and we were there until, oh, at least midnight or after.

Q. And when you left the Warburton's house, where did you go?

A. We went home.

Q. When you got to your home, was anyone else there?

A. Yes.

Q. Who do you recall being present?

A. Well, my two daughters were there, and their boyfriends. And there was another couple there.

[30] Q. Was there a party going on in your home?

A. Not really a party, no. There was — they were just sitting around, but it wasn't like a party.

Q. Did you observe anyone at that time smoking marijuana in your home?

A. No, I did not.

Q. Have you yourself ever smoked marijuana?

A. No, I have not.

Q. Have you ever had that or any other drug in your possession at any time?

A. No, I have not. Not other than prescription drugs from the drugstore, prescribed by a doctor.

• • • •

Cross Examination

BY MISS LaSALLE:

[33] Q. Now, turning to the day of your arrest. You've testified that you were brought to the Wickford Barracks and that you were brought eventually, you were brought into a room . . . . the large room in the garage where there are seats for everyone to sit down.

A. Yes.

[34] Q. Did you recognize anyone when you walked in that room?

A. Yes, I did.

Q. And who did you recognize?

A. A David Coleman.

Q. And how do you know David?

A. David is married to my niece.

Q. And you spent a few hours in that room, is that correct?

A. Yes. Correct.

Q. And during that course of time, did other people come into the room?

A. Yes.

Q. Approximately how many?

A. I think the papers said what, seventeen or something like that?

Q. And did you recognize anyone else who was brought in that, into the room?

A. Yes.

Q. And who was that?

A. My daughter was brought into the room.

Q. And what is her name?

A. Jaime DeJoira.

Q. And did you recognize anyone else?

• • • •

[35] A. I don't think I knew — I knew David Coleman, my nephew and I knew my daughter and I don't think I knew anyone else in the room at all, no.

Q. Did you know Paul Driscoll?

A. Yes, I'm sorry, I did.

Q. How did you know Paul Driscoll?

A. Paul Dr[illegible]ll, at the time was going with my daughter.

Q. All right. And were they brought into the room together, Mr. Briggs?

A. I — not together, no.

Q. Approximately at the same time, is that correct?

A. Yes.

Q. Now, had you known Paul Driscoll for maybe — for a period of time prior to that?

A. For probably three or four weeks prior to that. Not too long before that.

Q. Three or four weeks?

A. Yes.

Q. So is it fair to say the first time you met him was maybe in February of 1981, is that what you're saying?

A. Could have been longer, it could have been a couple of months or something like that. Wasn't too long before that. It was —

Q. Did you know him in December of 1980?

* * * *

[36] A. Okay. December of 1980, oh yes, I did know him in December of 1980.

Q. Okay. And did you occasionally have the opportunity to call him on the telephone?

A. Did I?

Q. Or to call his telephone number?

A. If I wanted to speak with my daughter I would call there, yes.

Q. Okay. Turning to the date of December 19, 1980, you have testified here today that you returned from a party. You returned to your house late that evening?

A. Right.

Q. Approximately twelve o'clock, is that fair to say?

A. Twelve, twelve-thirty, somewhere in there, yes.

Q. And at that time two of your daughters were there with friends, is that correct?

A. Right.

Q. And could you tell us the name of the friends?

A. One was this Paul Driscoll and David Coleman and my niece was there, Carolyn Gross Coleman. And Sandy, my other daughter, was there with her fiance, they just came in from [37] Washington, DC and his name is — was Scott Paul.

Q. And did —

A. They're now married.

Q. And they were in your house at the time you arrived, is that correct?

A. Yes.

Q. And what part of the house were they in?

A. I guess in the livingroom, they had a fire going in the fireplace.

Q. And did you sit down and talk to them for awhile?

A. Not — like hi. Not very long, no. I didn't sit down with them. I have a chair over in another part of the house which is my easy chair and I watch television over there and that's where I went.

Q. You did say hello to them? That's corect.

A. Yes, I did.

Q. And would you say you communicated with them from maybe five or ten minutes, or twenty?

A. No, five minutes or so.

Q. Okay. Was your wife with you also at that time?

A. Yes, she was.

Q. And did she also communicate with this group of people for awhile?

A. Yes, she did.

Q. Did she stay and talk to them longer than you did?

[38] A. Maybe five minutes longer than I did, then she went up to bed.

Q. How long were you downstairs? On that evening.

A. Well, I probably fell asleep in my chair, and I—I don't know. I don't know. I was there maybe an hour or so.

• • • •

LOUISA BROWNING BRIGGS, PLAINTIFFS' WITNESS, SWORN

Direct Examination

BY MR. FOLEY:

Q. Mrs. Briggs, it may go without saying, but you are the wife of Mr. Briggs, who is sitting here at counsel table?

A. Yes.

Q. Where do you live, Mrs. Briggs?

A. 15 Carver Lane, Narragansett.

Q. You live there with your husband?

[39] A. Yes.

Q. How long have you lived in Narragansett? Or the southern Rhode Island area?

A. Oh, since we, we were married in '51 and we've lived in Narragansett that long. I've been in the area since I was ten years old.

• • • •

Q. Do you have any children, Mrs. Briggs?

A. Yes, four children.

Q. What are their names?

A. Nancy Fell, F-E-L-L, Jamie DeJoira, D-e-J-o-i-r-a, Sandra Paul, P-a-u-l, and Jeffrey Briggs.

Q. Do any of those children live at home with you still?

A. My son, Jeffrey Briggs.

Q. Mrs. Briggs, do you recall the day, March 19, 1981?

A. Very vividly.

Q. What is the first thing you recall about that day?

A. Hearing the knock on the door. It woke me. And then my—I heard voices downstairs and then my husband came up [40] the stairs and woke me up. Well, he didn't wake me. I was awake. He came up and told me to put my clothes on, we were going to take a ride. And I said, at this hour? And he said put your clothes on, we have just been arrested. So I'd come down.

Q. What was your emotional feeling at that point when you—when he informed you that you had been arrested?

A. I didn't believe it. I, I couldn't believe it.

Q. What happened after that?

A. I walked down the stairs and looked in the kitchen and the downstairs and there were troopers, some in uniform—well, some in uniform and there was a gentleman out of uniform in plain clothes.

Q. Did you recognize any of the uniformed officers?

A. No, I don't think I really looked at them even.

Q. Did you see any police cars there?

A. Yes. Two with flashers and two other cars.

Q. What happened after you went downstairs?

A. We left the house. Jim said, shall I drive my own car? And they said, no, you'd better ride with us.

And then he said, well, how am I going to get home, and Mr. Almberg, Lt. Almberg, that is his name, said, well don't worry about it, we'll get you home.

Q. Was this the gentleman who was in plain clothes?

A. Yes.

[41] Q. Did you get into one of the police vehicles?

A. Yes. In an unmarked car.

Q. Was your husband with you at the time?

A. Yes, he was in the back seat with me.

Q. Do you recall who the police officers were who were driving the car and riding with you?

A. Captain Cooke from Narragansett and Lt. Almberg.

Q. Had you known Captain Cooke prior to this day?

A. Yes.

Q. How did you know him and how long had you known him?

A. Well, from growing up in town and being in town and we knew his parents before that.

Q. Can you say roughly how long you've known Captain Cooke?

A. I would say we've known the family since we were married in '51 and lived in Narragansett together.

Q. Where did you go when, in the police car when you left your home?

A. Directly to the barracks.

Q. Do you recall that ride up to the barracks?

A. Yes, I do.

Q. Can you describe how you were feeling during that ride?

A. I started to shake, I felt nauseated, couldn't figure out—very confused, couldn't figure out what was happening.

Q. What happened when you arrived at the barracks?

A. We were put into a small room together.

[42] Q. And how long were you in that small room?

A. Oh, not very long. And then an officer in plain clothes came in and took us to—took us. Me first, to another room to be fingerprinted.

Q. Can you describe what that process involved, the fingerprinting process.

A. He put each finger in the ink and pressed it onto the paper and took three sets of prints, and I had to sign for each one.

Q. Mrs. Briggs, how did you feel while this was going on?

A. I couldn't believe it was happening. It—things like this just don't happen. Not to us.

Q. What happened after the fingerprinting was done?

A. We were put in the end room, the garage as we like to call it. It was cold in there. Later, a photographer came in and took pictures with the numbers, front, side views, and then group pictures.

Q. When you say with the numbers, what do you mean?

A. A card with numbers to be held up in front. I guess identification numbers. I remember asking the trooper what happens to these when you find out that we haven't done anything, that we're innocent. He said, oh, they'll be disposed of.

Q. What did you say in response to that?

A. I said, don't you dispose of them. I'd like to come to [43] the station myself and do that, I want to make sure that they're out of the records.

Q. Do you recall how many photographs were taken, roughly, of you personally?

A. There was a full front photograph and then I think one from each side, and then maybe two in different groups of people who had been brought in that day.

Q. There were people being brought in after you had gone into this garage room?

A. Yes. Um hmm.

Q. How was your husband reacting to all of this? What did you observe about his reaction?

A. He was very agitated and upset. He paced the room all day. He never sat down once. He was just very upset. I was concerned because we left home without any medication and he has high blood pressure, and he takes it four times a day.

Q. Roughly, how long were you in this garage type room?

A. Until maybe two-thirty, three o'clock in the afternoon.

Q. What happened then?

A. We were put on the bus and taken to the West Kingston Courthouse.

Q. Before you were put on the bus, did you have any discussion with your husband about getting on the bus?

A. Yes. We decided to walk out straight and tall with our heads up in the air, because we felt this was the way to do [44] it. And then he said to me, well, what about my parents and your mother? They will probably see all of this on the news tonight. We'd better cover up like the rest of the group.

Q. Have you seen some newsmen outside?

A. Oh, yes. They were all lined up with cameras and—

Q. When you say lined up, can you describe exactly what you saw?

A. Well, along the path that we would have to take to the bus, they were along that path with the cameras all set up.

Q. So when you finally went out to the bus, how did you proceed out to the bus?

A. In pairs, in a line and just told, hurry along, get on the bus and do this and do that.

Q. Did you cover up your faces?

A. Yes, we did.

Q. How did you do that?

A. I had a jacket on and I pulled the jacket over my head and covered up as much of my body as I could even.

Q. How were you feeling at this point in going out to the bus and covering up your head with your coat?

A. Very degraded. I felt like a criminal. I felt as though this is the way people—now, I've seen all this on television before, I know how, you know, how you would feel now. I'm going through this nightmare.

Q. And when you got on the bus, where did you go?

[45] A. Directly to the courthouse.

Q. What did you see when the bus first pulled into the courthouse?

A. Photographers.

Q. Where were they located?

A. On the court steps outside.

Q. Did you leave the bus?

A. Yes.

Q. Were there more pictures taken?

A. Yes, there were.

Q. Did you cover yourself up there?

A. No.

Q. Not?

A. I think I just had it at that point. It was, forget it, it's over.

Q. What happened when you got into the courthouse?

A. We were ushered into a courtroom and told to take a seat. It was an empty courtroom. My husband stayed in the hall with the lawyer that he told you about that he had a meeting with that morning. An appointment with. And I know at one point I got up from my seat to go out. I thought I had to sign papers also, and I was told to sit down. And I stood up and I said, my husband is in the hall. We have a lawyer there, and I might have to sign papers. And this officer stood up in front of me and said, you will sit down. [46] And I think at that point if I hadn't, I would have been pushed down.

Q. What happened after you sat down in the courtroom?

A. We waited for the judge to come in and he had a stack of papers like this, in front of him. Mine was the one on top. I was the first one called.

Q. What did you do when your name was called?

A. Stood before him and he read this paper and that's the first time we had any inkling of why we had been arrested.

Q. When you were standing before him, were there other people in the courtroom?

A. Police. The other—yes, there were other people in the back of the courtroom. I don't know whether they were relatives of the people who had been arrested, whether they were attorneys or what.

Q. There were people in addition to those who had been arrested?

A. Um hmm. Yes.

Q. Do you recall what the judge said about the charges against you?

A. I was so upset, I really don't remember him even reading them to me. I remember pleading guilty or not guilty or whatever and I said not guilty. And they handed me papers and said go downstairs and sign them.

Q. Can you tell the jury what was going through your mind [47] while you were standing up in front of the judge and hearing the charges against you?

A. Well, this—things like this don't happen here. I mean this is something that happens in Russia, or somewhere else that you hear about. It's happening to me, right here. And I couldn't believe it. It was beyond my comprehending. I just thought, not me, not here, not now.

Q. What happened after you left the courtroom and went downstairs?

A. I had to sign the papers that they handed me. I think that's what it was. And I signed papers and then waited for my husband to come down. Went out in the hall and waited.

Q. What happened after that?

A. We were picked up and taken home by family.

* * * *

[52] Q. Do you recall the evening of December 19, 1980?

A. Yes, I do.

Q. Do you recall what you did that evening?

A. We went to a social party, Christmas party.

Q. Where was that party?

A. At Ralph Warburton's in Narragansett.

Q. How long—how late were you at that party?

A. It was after twelve. It was a large party. Oh, I'd [53] say there were 150 people there and there was a three piece band and entertainment, and it was a large party. We were there until after twelve.

Q. Did you come right home after that party?

A. Yes.

Q. Was there anyone in your home when you got there?

A. Yes. Four couples. My daughter Sandy and her fiance. They had just come in from Washington. They had invited a couple over to spend the evening with them, a young couple. And then my daughter Jaime, Paul Driscoll, Carolyn and David.

Q. When you say Carolyn and David—

A. Carolyn and David Coleman. Carolyn is my niece. The four of them had been out for dinner, Carolyn was sick and the closest place was my house, so they stopped at my house. And when I got in and she had already been sick and I was helping her with alka seltzer, trying to straighten her out.

Q. What were the other people doing when you got home?

A. Sitting by the fire in the living room and trying to take care of Carolyn who was not well.

Q. Would you describe what you saw as a party going on?

A. Four couples sitting around a fireplace, maybe they were having a drink, but that was it.

Q. How long did you stay with the people who were at your house that night?

A. Total, maybe a total of fifteen minutes.

[54] Q. What did you do after that?

A. I went right to bed.

Q. Mrs. Briggs, did you see any marijuana?

A. No.

Q. In your home that night?

A. No, I did not.

Q. Did you see anybody smoking any marijuana cigarettes?

A. No.

Q. Did anybody pass you a marijuana cigarette that night?

A. No.

Q. Have you ever had marijuana or any other illegal drugs in your possession, Mrs. Briggs?

A. No.

* * * *

Cross Examination

BY MISS LaSALLE:

Q. Mrs. Briggs, turning to the day upon which you were arrested in March. After you were picked up at your home, you traveled to the Wickford Barracks, and at that

time, after you were fingerprinted and what-not, you were brought into a large room, is that correct?

A. Yes.

Q. And when you entered that room, did you recognize anyone?

A. David Coleman.

[55] Q. And he is your niece's husband, is that correct?

A. Yes.

Q. And during the course of that day, several other individuals were brought into that room as they were arrested, is that correct?

A. That is right.

Q. And during the course of while the other people came in, did you recognize anyone else?

A. My daughter Jaime and Paul Driscoll.

Q. And how do you know Paul Driscoll?

A. Jaime came home from California where she was living after Thanskgiving in 1980, the end of the month, and Paul picked her up at the airport and brought her home and that's when I met Paul.

Q. Where was Jaime Briggs living then? Jaime DeJoira, is that her marriage name?

A. Yes. Yes. She's Jaime DeJoira. She was first at home with me, and then she moved in with Paul.

Q. And you believe you first met him in November of that year, if [sic] that right?

A. Yes, I know I did.

Q. And did he frequently come to your house during that period of time?

A. Yes, with Jaime. They would come to dinner, or just to visit or—

[56] Q. Did he attend some parties at your house?

A. Yes, he did.

Q. How frequently did they come to your house?

A. We're a close family and if I didn't talk to Jaime every day on the phone, I think I saw her every second or third day at least.

Q. So they frequented your house quite a bit?

A. Yes, they did.

Q. Now, was Jaime—was she—had she moved to Rhode Island for any purpose or—

A. Yes. Jaime was separated from her husband and initiating divorce proceedings and she had come home to Rhode Island.

Q. Now, you mentioned that friends of yours brought you home after you were arraigned at the courthouse, is that correct?

A. That's right.

Q. And who brought you home?

A. Jaime's ex-husband.

Q. And he was in Rhode Island at that time?

A. He was in Rhode Island. He was in Newport when all of this happened and I guess my son Jeffrey called

him, and he came right over. We're still very close. He is the father of my granddaughter and we are close.

* * * *

[72] EDWARD PETER MALLEY,
PLAINTIFFS' WITNESS, SWORN

Examination

BY MR. FOLEY:

Q. Mr. Malley, you're a member of the Rhode Island State [73] Police, is that correct?

A. Yes, sir.

Q. And you hold the rank of corporal now?

A. Yes, sir.

Q. When did you first join the state police?

A. I was sworn in on August 17, 1969.

Q. And you were sworn in as a trooper?

A. Yes, sir.

Q. And how long did you hold the rank of trooper?

A. Till 1978.

Q. Mr. Malley —

THE WITNESS: No, correction on that. I made a mistake. Till 1981.

Q. When in 1981 did you receive a promotion?

A. September 6, 1981.

Q. And that's to the rank that you now hold, is that right?

A. Yes, sir.

Q. And that's corporal.

A. Yes, sir.

Q. In 1980, the end of 1980, and the beginning of 1981, you were in the detective's division, is that right?

A. Yes, sir.

Q. And you were assigned to the narcotics duty, is that correct?

A. Yes, sir.

[74] Q. And you became involved in an investigation involving a gentleman known as Paul Driscoll, is that right?

A. Yes, sir.

Q. And in the course of that investigation, you received permission from the Superior Court to place a wire tap on his phone, is that correct?

A. His and somebody else's.

Q. All right. But his phone, anyway, is that right?

A. That's correct.

Q. And it was as a result of that investigation that you proceeded to obtain an arrest papers, for the arrest of Mr. and Mrs. Briggs, is that right?

A. I put affidavits together and brought them to a judge for his review.

Q. Right. And the judge signed these papers and the Briggs were arrested, is that correct?

A. That's correct.

Q. And you were the officer in charge of that investigation, is that right?

A. Yes, sir.

* * * *

[86] Q. Mr. Malley, I'm going to show you documents that we have marked as plaintiffs' exhibits 1 and 2 for identification, and ask you if you recognize them?

A. Yes, I did.

Q. Could you tell me what those are?

A. They are arrest affidavits with the complaint.

Q. And who do they pertain to?

A. One pertains to Louisa B. Briggs and the other to James R. Briggs.

Q. These are documents that you prepared, is that correct?

A. The affidavit, yeah, I would have prepared. Yes I did.

MR. FOLEY: Your Honor, I'd like these exhibits marked full for — for full at this time. The document pertaining to James Briggs as plaintiffs' 1, and the document pertaining to Louisa Briggs are plaintiffs' 2, full.

THE COURT: I hear no objection. They may be marked.

* * * *

[87] Q. Mr. Malley, I put up on the screen page 1 of the document marked as plaintiffs' exhibit 1 for identification, and I'd like to ask you a few questions about that. You completed the typewritten portion at the top

up to and including the part denominated arrest warrant, is that correct?

A. Up — yeah. The top part, yes.

Q. And you completed the two lines below where it says arrest warrant, those lines begin State ex rel vs. defendant, those were filled in by you, is that correct?

A. That's correct.

Q. And that's something that you filled in prior to taking the paper work to a judge for the judge's review, is that right?

A. That's correct.

Q. And then after you take it to the judge for review, he either signs it or doesn't sign it. In this case, he signed it, is that right?

A. Yes, in this case he signed it, yes.

Q. Is that his signature that appears toward the bottom of the page, Judge of District Court?

A. That's correct.

[88] Q. I'd like to put up the second page of that document also so we can refer to that.

THE COURT: Is that the second page of the affidavit?

MR. FOLEY: Yes, your Honor.

THE COURT: All right.

Q. Officer, the second block here, where it was denominated affidavit and there's some typewritten portion that begins "pursuant to a court order wire intercept."

The last typewritten line there says, "see attached affidavit." I'm going to show you the second page of the document that we marked as exhibit 1, and ask you if that is in fact the attached affidavit.

A. That's correct.

* * * *

[90] Q. And then there's a signature line at the bottom, that's your signature, is that correct?

A. As the affiant.

Q. And below that there's a line and it says "judge" and there's a signature there. Do you know whose signature that is?

A. Judge John J. Cappelli.

Q. He signed that in your presence?

A. Yes, he did.

* * * *

Q. The page that now appears on the screen as page 3, is the same as the page 3 of exhibit number 1 that you have before you?

A. Yes.

Q. Have you typed in the information on this page?

A. Yes.

Q. When did you type that in?

[91] A. When I was preparing these. The paperwork.

Q. All right. This was prior to a hearing before Judge Cappelli, is that right?

A. Yes, sir.

Q. All right. In fact, you prepared these affidavits some time around ten days after the wire tap shut down, is that right?

A. About that.

Q. That was around the turn of the year, sometime early January or late?

A. Well, we shut down in January.

Q. Of 19 —

A. '81.

* * * *

[92] Q. Referring to your — referring your attention to the document that we've marked as plaintiffs' exhibit number 2 for identification. Is it fair to say that this document is similar to the three page document we just saw, except it refers to Louisa Briggs?

A. Yes, sir.

Q. All right. I've now put up the first page of the document on the screen, and that corresponds to page 1 that you have before you. Is that right?

A. Yes, sir.

Q. And there again is the affidavit section that you filled out before you appeared before Judge Cappelli, is that right?

A. Yes, sir.

Q. And you filled this out some time in early January?

A. No. No. We didn't shut down until the latter part of January, so it would be the end of — beginning of February.

• • • •

[93] Q. I have now put up a transparency that reflects page 3 of the exhibit. Is that correct?

A. Yes, sir.

Q. And again, you typed in the information that appears [94] in typing on this document some time late January or early February?

A. Yes.

• • • •

THE COURT: What is this document for, Mr. Foley?

MR. FOLEY: Mr. Malley, what use do you make of this document? What is the purpose of this document, this third page of the exhibit?

THE WITNESS: It's what we call a complaint, basic complaint.

Q. This is something that's filed in court, is that correct?

A. Yes, the original would go to the court.

• • • •

THE COURT: All I'm trying to get across so that [95] the jury will understand, is whether or not this document is necessary before an arrest warrant issues.

Q. All right, could you answer that question, Mr. Malley?

A. The arrest warrant. Yes, it would be necessary.

Q. This is something that's presented to the judge that you're asking to sign the warrant, is that correct?

A. The — you're confusing me a little bit, Mr. Foley. The arrest affidavit is presented to the judge along with the complaint. He reviews the arrest, the application, okay. The affidavit. If he feels that there is sufficient probable cause to arrest an individual, the judge puts his signature on the warrant and you're able to go out and arrest under Rhode Island law.

THE COURT: What was the document that led to the arrest? This is what I'm trying to get at.

Q. He also puts his signature on this document, is that correct?

A. Yes, he does.

Q. And which of the documents that we've seen is the document that leads to the arrest of the person who is charged?

A. The arrest — the first two documents would be the arrest affidavit. And the arrest warrant is the face sheet of the — the affidavit in this particular case is the second document which authorizes the arrest. We cannot — at one point under Rhode Island law, we could arrest on that [96] particular document. They changed it to where we had to have an arrest affidavit and after the judge signs it, it becomes an arrest warrant.

Q. Is it fair to say you cannot —

THE COURT: I'm sorry. I really don't mean to interrupt, but this is very important for certain legal as-

pects of the case, that this be clear beyond any doubt. And what I would like to have clearly put on the record, and you and counsel can get together and stipulate exactly how this develops, step by step. You had a wire tap, you got information. Now if you — what do you do? What did you do from there? How do you get an arrest and how does the action, how is the action started. And I think either you both can get together because it certainly is a matter of law and there's nothing to debate. Just read it into the record so that this jury will know what documents exactly we look to to decide some of the issues that are involved in this case.

* * * *

[98] MR. FOLEY: Your Honor, the parties have agreed on and stipulated to the facts which generally describe the procedure in which a matter — a criminal matter of this sort is instituted. And if, your Honor please, I'll read that briefly into the record and then continue my questioning of Officer Malley on that point.

THE COURT: You're going to read the stipulation?

MR. FOLEY: Yes, your Honor.

THE COURT: All right.

MR. FOLEY: The parties stipulate that the procedure is as follows: The Superior Court of Rhode Island authorizes a particular wire tap on a phone or phones. Calls on, to or from that phone are then monitored and logged by the State Police. Calls which are considered to be incriminating by the State Police are reported to the superiors at the State Police. The officer at the State

Police in charge of the investigation reviews the calls considered to be incriminating and decides which calls he believes provide the basis for preparing and submitting an affidavit and arrest warrant, and District Court Complaint. The officer then prepares the affidavit and the arrest warrant and the District Court complaint. These are submitted to the Judge of the District Court, who reviews both of them and, either signs [99] or refuses to sign both of them.

THE COURT: In short, it's the judge that is the final determining factor as to whether or not an arrest warrant will issue?

MR. FOLEY: That's correct, your Honor.

THE COURT: Okay.

Q. Officer Malley, just so that we all understand the paper work that's done with regard to this type of matter. The document that's now on the screen is a District Court felony complaint, is that correct?

A. Yes, sir.

Q. That is one of the documents that you, as the officer in charge of this investigation, prepares when you feel the evidence obtained on the wire tap justifies criminal charges, is that right?

A. That's correct.

Q. And you prepare one other document in connection with that for submission to the District Court Judge, is that right? And that document is known as an affidavit and arrest warrant, is that right?

A. Yes, sir.

Q. And you prepare the affidavit. And in this case, you had a separate page because the affidavit would not fit in the block on the first page, is that right?

A. Yes, sir.

[100] Q. The two page affidavit and arrest warrant is then submitted to the District Court Judge along with the District Court complaint form and the judge then either decides to sign it which authorizes you to go ahead, or he refuses to sign it, in which case that's the end of that particular arrest warrant, unless you get more evidence, is that right?

A. Yes, sir.

Q. Now, Mr. Malley, with respect to the particular criminal investigation that we've been talking about here today. A call was monitored on the wire tap on December 20, 1981. Is that correct?

A. Did you say "a" call? There was —

Q. One or more calls.

A. Yes. Yes, sir.

Q. That fair to say?

A. Yes, sir.

Q. And records of those calls were made in writing, is that right?

A. Yes.

Q. All right. And they were made by the officer who overheard the calls, is that correct?

A. Yes.

• • • •

[101] Q. I'm going to show you, officer, a document that we've marked as plaintiffs' exhibit number 4 for identification, and ask if you recognize that document.

A. Yes, I do.

Q. What is that document?

A. This is a call log sheet that we use on wire taps.

Q. What is the purpose of that document?

A. This is to — for the officer that's monitoring the calls to put down that the number — the number of the call which we'll start with number 1, the time the call came in, whether it was an incoming call or an outgoing call. If it was an outgoing call, we would get the telephone number that the party called. Then you have another space if it is an incriminating call or a non-incriminating call, then you have the reading, which is the footage reading on the tape to tell you where you are on the tape. And then there's another space for the officer that monitored that call to put his initials in. Then there's a larger space where the officer writes down a synopsis of the call that came over the wire intercept.

Q. Now —

A. On the —

MR. FOLEY: I'm sorry. Go ahead.

A. On the bottom of the call log is the reel that it was recorded on, the side that it was recorded on, which we [102] only use side 1, the date and the day. And then the troopers will sign it. And that we're working that particular day.

Q. And you signed that particular sheet, is that correct?

A. Yes, I've signed, — I've signed it, yes.

* * * *

[103] Q. So Officer Miranda was the one actually listening to the wire tape at the time this call came in, is that correct?

A. That's correct.

[104] Q. Now, I'll ask you, officer, to read this message column for that particular call if you can.

A. Okay. "Male party calls. Paul states —" "Male party calls Paul, states this is Doctor Shotgun — general conversation re. a party they went to last night — spot monitored — caller says I can't believe I was token in front of Jimmy Briggs — caller states he passed it to Louisa —"

MR. FOLEY: Is that next word "caller"?

A. Okay, yeah. "Caller and Paul talk about another party going down tonight — Paul says Nancy was sitting in his lap rolling her thing — conversation then is general —caller says he will pick up Paul at six-thirty tonight to go to the other party."

Q. On the fourth line the phrase "spot monitored" here. What does that mean?

A. Would — what he would have done then is shut the machine down if they were getting into a general conversation.

Q. And because there's no more here, does that mean that he began listening again and recorded?

A. Yes. Spot monitoring you just shut it down and then you wait a few seconds and turn it back up.

Q. And what appears here then is what he heard after he turned it back on after spot monitoring?

A. That's correct.

* * * *

[106] Q. Now you testified, officer, that you did not listen to those tapes at the time the recording came in, is that correct?

A. No, not at that time, no.

Q. And subsequently the fact that that call came in was brought to your attention, is that correct?

A. Yes, it was.

Q. When was that?

A. That would have been either the 20th or the following day, I don't recall.

Q. All right. Would you describe the circumstances which that call was brought to your attention?

A. Yeah, when I came into the command post, Detective Ronald K. Youngsma told me about the call and of the conversation. The word "token" being used, the word "rolling her thing" being used, and that the party was over [107] at the Briggses house. You know, I can't remember exactly everything that he said to me. That was basically it. What I can remember.

* * * *

[108] A. As I stated, I was advised of this either on the 20th or the—which I believe was the 20th by Ronald K. Youngsma. He advised me of the call. And I'm the one who changed that to an incriminating call based on the facts of our conversation in regard to the common word of "token" being used which is the word used for smoking marijuana. And the word [109] "rolling her thing" which is a very common in drug terminology of rolling a marijuana cigarette. So this call was not a non-incriminating call, it was an incriminating call and further I have to report these calls to the presiding justice of the Superior Court. A report that has to go into him on Monday of each week which is under the wire tap law. So insofar as the date of 12/27, it could have been overlooked by me, that I put the "i" down or neglected to change that to an incriminating call, and I did that to show that I'm the one who changed it, so there'd be no question later on when I went in to Superior Court, if there was a trial in regard to the matter.

Q. All right, but the only thing I'm trying to establish, officer, is when this first call came in and was monitored by Officer Miranda he designed it as non-incriminating. Is that correct?

A. Yes, he did.

Q. All right. And subsequently, that day or the day after the call was brought to your attention and you determined, based on your experience as a police officer, that some of these words here referred to—some had something to do with drugs or narcotics and therefore you determined that this was in fact an incriminating call in your judgment. Is that fair to say?

A. In my judgment. And in Ronald K. Youngsma's judgment.

[110] Q. All right.

A. Who was my partner.

• • • •

Q. . . . . Now, following the shut-down of this particular wire tap, there came a time when you reviewed the calls that you or other officers had judged to be incriminating in order to decide which cases you were going to go forward with and attempt to present to the District Court for signature of arrest warrants. It that correct?

[111] A. That would be correct, yes.

Q. And when you did that, you had some document in front of you, is that right?

A. Yes, I did.

Q. All right. Did you have the document in front of you that we just viewed the log sheet?

A. Yes, I did.

Q. Did you have any other documents in front of you?

A. Yes, I did.

Q. All right. What documents would that be?

A. That would be the incriminating report made out on December 20, 1980 by Detective Miranda, or on or about the 20th.

Q. I'm going to show you a document that we've marked as defendants' B for identification, and ask if you recognize that document.

A. Yes, I do.

Q. Is that the incriminating call report that you've just referred to?

A. That's correct.

* * * *

[113] Q. Officer, were there any other documents you had before you pertaining to the contents of the telephone calls [114] when you prepared the arrest affidavits in this case?

A. I had this, and the incriminating report, and I had the call logs.

Q. All right. Were there any other documents that you had before you other than those?

A. No.

Q. All right. Those documents formed the basis for the affidavit that you prepared, is that correct?

A. That's correct.

Q. And you didn't listen to the tape recordings at the time you based your affidavits on the documents that you had before you, is that right?

A. I—the other officers listened to the tapes and submit these reports.

Q. Right. What I'm saying, you would refer to the reports that were submitted by the officers who heard the tapes. You would not listen to the tapes, is that right?

A. That's correct.

Q. Is that right?

A. That's correct.

Q. So with regard to Jim and Louisa Briggs, the information that you had before you was that one incriminating call report that we've just seen, plaintiffs' number 5, and the call log sheet, the two page plaintiffs' number 4, is that correct?

A. That's correct.

[115] Q. And based on those documents, you determined that there was sufficient evidence to warrant the presentation of this to Judge Cappelli, is that correct?

A. That's correct.

Q. Now, the standard by which you gauge your decision whether to present this information to a judge, is what's known as probable cause, is that right?

A. Yes, sir.

Q. Once—what's your understanding of the phrase probable cause?

A. Probable cause is the reasonable belief that a crime has been committed.

Q. So it's fair to say that it was your opinion after having read those calls that James and Louisa Briggs had committed a crime?

A. Yes.

Q. All right. And it is fair to say that it was your opinion that the crime that they had committed was the crime that you typed into this space on the District Court felony complaint "conspiracy to possess marijuana", is that right?

A. Conspiracy to possess marijuana with intent to deliver. With intent to deliver is not on the complaint.

The charge would be in this particular matter, which is an oversight on my part, I'll admit that as far as not putting "with intent to deliver." It's possession of marijuana with intent to [116] deliver. Conspiracy.

Q. Officer, I'd ask you to look at plaintiffs' exhibit number 1 for identification, the District Court felony complaint, pertaining to James Briggs. Do you have that before you?

A. I can see that one right there.

Q. Now that says nothing about possession with intent to deliver, is that correct?

* * * *

A. No, it does not.

Q. All right. But what you're telling us today is that the evidence that you had before you, that is, the call log sheet and what was described in that, and the incriminating call report, which simply reflected the call log sheet, gave you facts and circumstances upon which you concluded that James and Louisa Briggs were guilty of the crime of conspiracy to possess marijuana with intent to deliver. Is that correct?

A. I'm not a judge of whether a person is guilty or not guilty. I—what I did was the proper procedure that I've been instructed to do. I prepared affidavits on 22 people.

* * * *

[117] A. And brought the affidavits to a judge after calling the judge for an appointment—

* * * *

A. And went to the judge at the time he designated me to be there. He reviewed these arrest affidavits and after his review, he signed them. Now, whether a person is guilty or not guilty, I don't make that determination. That's not my job as a police officer. My job is to bring the facts that I have before me to a judge who's an impartial party to review them to see if there is enough probable cause to bring them before the court period.

* * * *

[118] Q. Officer, you testified earlier, correct me if I'm wrong, but that you understood probable cause to mean facts and circumstances which were sufficient to cause a belief that a crime had been committed. It that correct?

[119] A. I stated reasonable belief that a crime has been committed. I believe that's what I stated.

Q. All right. Reasonable belief that a crime has been committed. My question to you now is, officer, was the crime that you believed had been committed conspiracy to possess marijuana or conspiracy to possess marijuana with intent to deliver?

MISS LaSALLE: Objection.

THE COURT: Overruled.

A. It would be conspiracy to possess marijuana with intent to deliver.

Q. But that's not what you typed in on the complaint form, is that correct?

A. That's right.

MISS LaSALLE: Objection.

THE COURT: I'll let the answer stand.

Q. So, officer, if I understand you correctly, you're saying that the information you gathered from the call log sheet and the incriminating call report, gave you an, and I'll quote your words, "reasonable belief that a crime has been committed." And that that crime was conspiracy to possess marijuana with intent to deliver. Is that fair to say?

MISS LaSALLE: Objection.

THE COURT: Overruled.

A. Yes.

* * * *

[120] Q. Referring either to this call report or the log sheet, or the affidavit itself, I'd like you to tell us what it was about the information you had that led you to believe this was a conspiracy.

MISS LaSALLE: Objection.

THE COURT: Overruled.

A. Okay. In a wire tap all charges are conspiracy. You—they're all conspiracies. All conspiracy charges in a wire tap.

Q. Why is that?

A. You don't have the physical evidence.

Q. Is that something that you've been taught in the course of your training as a State Trooper?

[121] A. A conspiracy is—you do not have to commit the act on a wire tap. If you are talking of selling,

we'll, for example, distributing dope, all you have to do is talk about that, that you're going to do it and that is conspiracy. That is a charge.

Q. My question to you, officer, was, is that what you were taught as a State Trooper, that everything on a wire tap is a conspiracy. That was my question. Do you understand that question?

A. That's correct.

Q. That's correct? That's what you were taught as a State Trooper?

A. That it's a conspiracy charge, yes.

* * * *

[122] Q. Now, officer, you said that everything on a wire tap is a conspiracy. Can you explain what you mean by that?

[123] A. Certainly. If the conversation is of such that of talking of committing a crime, you would charge on conspiracy to commit said crime. If I was talking that I'm going to commit a murder, that would be a conspiracy to commit murder. I would have to say who I'm going to, you know, kill. But it would be a conspiracy.

Q. Now, in this particular case the evidence that you heard from this caller, unidentified male was that he said, "I can't believe I was token in front of Jimmie Briggs." Is that right?

A. That's right.

Q. From that statement, you deduced that there was reasonable belief that a crime had been committed and

that crime was possession of marijuana with intent to deliver, is that right?

MISS LaSALLE: Objection.

THE COURT: Overruled.

A. Did I? Yes.

Q. Possession on the part of Jimmie Briggs?

A. Conspiracy to possess on the part of Mr. Briggs and Mrs. Briggs. It was their house, their party. Marijuana was being smoked at that party. It was passed to Mrs. Briggs according to the tape on both conversations. And there was another girl named Nancy who I don't know who is unidentified sitting on her lap, rolling her own. What was she rolling? She was [124] rolling a marijuana cigarette. That's a common term used in drug terminology. And if she was rolling a marijuana cigarette, Mr. Foley, she must have had a bag of marijuana to do it.

Q. Did you ever search the Briggs house?

A. No, I did not. I didn't go to the Briggses house.

Q. Did anybody ever search the Briggses house?

MISS LaSALLE: Objection.

THE COURT: Overruled.

A. No. I didn't search it.

Q. Did you ever find any marijuana in the possession of James or Louisa Briggs?

MISS LaSALLE: Objection.

THE COURT: Overruled.

A. There was none on their possession to my knowledge.

Q. But yet they were charged with conspiracy to possess, is that correct?

A. With intent to deliver.

Q. Simply because someone said that they were smoking a joint in front of Jimmie Briggs, is that right?

MISS LaSALLE: Objection.

THE COURT: Overruled.

A. Simply because they were — it was in their house.

* * * *

[125] Q. Officer, you said that the Briggs, as far as you know, had no marijuana on them, is that right?

A. To my knowledge. Nobody told me they had it on them when they were arrested.

Q. And the only evidence of what you deem conspiracy to possess, is that someone had marijuana in their house that night. Is that right?

A. More than one person.

Q. All right. More than one person.

A. That is correct.

Q. That's the evidence that you had, is that right?

A. That's correct.

Q. Right. What in your mind was there about that evidence that led you to believe that not only did they possess marijuana but that they intended to deliver it?

[126] MISS LaSALLE: Objection.

THE COURT: Overruled.

A. The conspiracy there with intent to deliver is the passing around of the marijuana, okay? It's being passed from one person to the other, which is a delivery. That's where it's conspiracy to possess with intent to deliver.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 81-0577P

JAMES R. BRIGGS and LOUISA BRIGGS,

vs.

EDWARD MALLEY and the
STATE OF RHODE ISLAND,

JUDGMENT

This civil action having been tried before the Court and a jury, and defendants' motion for directed verdict having been granted as to all counts of the Complaint on February 2, 1984, judgment is hereby entered for defendants Edward Malley and the State of Rhode Island.

See attached transcript of 2/2/84.

ENTER:

/s/ Raymond J. Pettine
Senior Judge

BY ORDER:

/s/ Concetta K. Zinni
Deputy Clerk

2/28/84

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title omitted in printing.]

MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR RELIEF FROM JUDGMENT

Plaintiffs move this Court, under Fed. R. Civ. P. 59, for a new trial, or, alternatively, under Fed. R. Civ. P. 60(b)(6), for relief from the judgment entered in this action on February 28, 1984. This motion is directed only to the claims against defendant Malley. This Court's ruling as to the claims against the State of Rhode Island is not challeneged.

A new trial should be granted in this action because the United States Court of Appeals for the First Circuit, in *B.C.R. Transport Co., Inc. v. Fontaine,* No. 83-1335, (1st Cir. February 8, 1984), decided six days after this Court granted defendants' motion for directed verdict, has clarified the law applicable in this action and has implicitly indicated that its earlier decisions of *Madison v. Manter,* 441 F.2d 537 (1st Cir. 1971) and *Stadium Films, Inc. v. Baillargeon,* 542 F.2d 577 (1st Cir. 1976), relied upon by this Court in its decision granting the motion for directed verdict, no longer apply to arrest-pursuant-to-warrant cases.

A copy of the Opinion in *B.C.R. Transport Co., Inc. v. Fontaine, supra,* is attached to plaintiffs' memorandum

of law, which sets forth in detail the reasons this motion should be granted.

James R. Briggs and
Louisa Briggs

By their attorneys,
Decof & Grimm
One Smith Hill
Providence, RI 02903
(401) 272-1110

/s/ John S. Foley

[Certification omitted in printing.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title omitted in printing.]

OBJECTION TO MOTION FOR NEW TRIAL
OR RELIEF FROM JUDGMENT

Now comes the defendant, Edward Malley, and objects to the plaintiffs' motion for a new trial, or in the alternative, relief from judgment. The reasons in support of this Objection are set forth in the Memorandum of Law that will be filed on March 26, 1984.

Edward Malley
By his attorney,
Dennis J. Roberts II
Attorney General

By: /s/ Faith A. LaSalle
Special Assistant
Attorney General
72 Pine Street
Providence, R.I. 02903
(401) 274-4400

[Certification omitted in printing.]

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

STATE OF
RHODE ISLAND
AND
PROVIDENCE
PLANTATIONS

72

PLAINTIFFS' EXHIBIT 1

AFFIDAVIT AND ARREST WARRANT

AFFIDAVIT

AFFIANT	AGENT OF
Det. Edward P. Malley	Rhode Island State Police
DEFENDANT	**ADDRESS** NO STREET CITY/TOWN STATE
James R. Briggs, alias John Doe	Carper Road, East Pond Heights, Narragansett, R.I.

AFFIDAVIT

Your affiant upon oath states that he has reason to believe and does believe that grounds for issuance of an arrest warrant exists and states the following facts on which such belief is founded:

Persuant to a court ordered wire intercept signed by the Honorable Anthony A. Giannini, Presiding Justice of the Superior Court of the State of Rhode Island and Providence Plantations, on November 25th, 1980 and a extention order signed on December 23rd, 1980 giving permission for members of the Rhode Island State Police to intercept oral communications over telephone number 401-789-3108.

See attached affidavit, attached there to and made part of:

IF SPACE IS NOT SUFFICIENT, CHECK (X) HERE AND
[X] ATTACH ADDITIONAL INFORMATION

AFFIANT
x Det. Edward P. Malley

SUBSCRIBED AND SWORN TO BEFORE ME AT (CITY/TOWN)	DATE	JUDGE OR DISTRICT COURT JUSTICE OF SUPERIOR COURT OR ANY OTHER AUTHORIZED OFFICER
West Kingston	12-15-80	x

ARREST WARRENT

STATE EX REL.	COUNTY	DATE OF BIRTH	DIVISION	WARRANT DATE
xxxxx Member of Rhode Island State Police	Washington	10-26-23	4th RHODE ISLAND DISTRICT COURT	12-15-80

VS. DEFENDANT	ADDRESS NO STREET CITY/TOWN STATE
James R. Briggs, alias John Doe	Carper Road East Pond Heights Narragansett, R.I.

TO ANY AUTHORIZED OFFICER: Affidavit (and complaint) having been made to me under oath, and as I am satisfied that there is probable cause for the belief therein set forth that grounds for issuing an arrest warrant exists, you are hereby commanded to arrest the defendant forthwith and to bring him before a judge of this court without unnecessary delay.

BAIL	WITH/WITHOUT	DATE SIGNED	JUDGE OR DISTRICT COURT JUSTICE SUPERIOR COURT OR ANY AUTHORIZED OFFICER
$	[ ] with [ ] without	12-15	x

RETURN OF SERVICE

I have apprehended the within named defendant and have presented him/her before the court as herein commanded.

SERVICE	MILEAGE	DATE OF RETURN	AUTHORIZED OFFICER
$	$	3-17-81	x

sg 3/1/84
CP 84-0517

POLICE COPY

Page 2 of the arrest affidavit on James R. Briggs, alias John Doe, DOB:
of Carper Road, East Ford Height , Narragansett, Rhode Island.

On December 20, 1980, at 5:30 p.m. an incoming call was received to Paul Driscoll recorded on Reel 7, Side 1, Footage 30-48. This unidentified male calls Paul Driscoll and states, "This is Doctor Shotgun." General conversation reference to a party they went to last night. Caller states, "I can't believe I was token in front of Jimmy Briggs." Caller states that he passed it to Luisa. Caller and Paul talk about another party going on tonight. Paul says that Nancy was sitting in his lap rolling her thing.

On the same date at 5:56 p.m., Reel 7, Footage 48-59. Male subject Scott calls Paul Driscoll. General conversation about a party at Jaime's parents' home. Also, that they went there last night. They are referring to Jaime's parents' home, that is James and Luisa Briggs. Further, in regard to the conversation at 5:30 p.m. this unidentified male who called himself Doctor Shotgun stated that he was token in front of Jimmy Briggs. In your affiant's experience, he was smoking a marijuana cigarette in front of James Briggs. He then states that he passed it to Luisa. Luisa would be Luisa Briggs. He passed her a marijuana cigarette. Where Paul states that Nancy was sitting on his lap rolling her thing, she was rolling a marijuana cigarette.

Therefore, your affiant requests that an arrest warrant be issued for James R. Briggs, alias John Doe, DOB:

Affiant

Judge

2-25-81

RHODE ISLAND
AND
PROVIDENCE
PLANTATIONS

800968

74

DISTRICT COURT
FELONY COMPLAINT

COMPLAINT NO.

D 001 F (11/77)

▼ COMPLAINING AGENCY COMPLETE AREA IN HEAVY OUTLINE ▼

STATE EX REL	COUNTY	DIVISION	OFFENSE DATE
~~xxxxxx~~ Member of the R.I. State Police	Washington/S. Kingstown	4th DISTRICT COURT	12-19-80

VS./DEFENDANT	DEFENDANT'S ADDRESS	PHONE #
James R. Briggs, alias John Doe	Narragansett Carper Road, East Pond Heights, Narragansett, R.I.	

DATE OF BIRTH	SOCIAL SECURITY NO.	PROBATION NO.	OTHER I.D. (M.V.LIC. NO.)
10-26-23			

COMPLAINANT	COMPLAINANT'S ADDRESS
Rhode Island State Police	

TO ANY JUDGE OR AUTHORIZED JUSTICE OF THE PEACE FOR SAID DIVISION: The here named complainant on oath, in the name and behalf of the State, says that the here named defendant (alias John/Jane Doe) on the date stated with force and arms acted in violation of law and wherefore the complainant prays that a summons or arrest warrant may issue to apprehend the defendant and that he be held to answer this complaint and be further dealt with according to law.

COMPLAINT

James R. Briggs, alias John Doe and Luisa Briggs, alias Jane Doe, and Paul S. Driscoll, alias Paul Doe did unlawfully conspire to violate the uniform controlled substance act of the State of Rhode ~~x~~ Island by having in their possession a controlled substance Schedule 1 to wit cannabis marijuana in violation of Section 21-28-4.08 of the General Laws as amended.

CONNECTED MISDEMEANOR CHARGE(S), IF ANY

CO-DEFENDANT(S), IF ANY:

Luisa B. Briggs, Paul S. Driscoll

STATUTE(S) VIOLATED	LOCATION OF OFFENSE
	South Kingstown ~~Narragansett~~

AUTHORIZED OFFICER	DATE SIGNED	TITLE	AGENCY
X		Detective	State Police

SWORN TO BY AFFIANT WHO RECOGNIZED ☐ WITH ☐ WITHOUT SURETY	DATE SWORN	JUDGE/JUSTICE OF THE PEACE AUTHORIZED TO ISSUE WARRANTS
		X

▼ INITIAL APPEARANCE ▼

INITIAL APPEARANCE DATE	ARRAIGNMENT DATE	BAIL	JUDGE/JUSTICE OF THE PEACE
		$	X

▼ ARRAIGNMENT ▼

ARRAIGNMENT DATE	ADVISED OF RIGHTS ☐ YES ☐ NO	BAIL	CONTROL DATE	
		$		
ATTORNEY NAME ☐ PRIVATE ☐ ASSIGNED			JUDGE	
			X	

▼ BOUND OVER ▼

BOUND OVER ☐ YES ☐ NO	DATE	BAIL	WITNESS FEES	COSTS	JUDGE
		$	$	$	X

DISPOSITION

DISPOSITION DATE	INDICTMENT/INFORMATION NO.	FILED/REJECTED ON
☐ CRIMINAL HISTORY BACKGROUND INFO.	CASE DISPOSED—NO COSTS	JUDGE X

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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PLAINTIFFS' EXHIBIT 2

AFFIDAVIT AND ARREST WARRANT

AFFIDAVIT

AFFIANT	AGENT OF
Det. Edward P. Malley	Rhode Island State Police

DEFENDANT	ADDRESS NO STREET CITY TOWN STATE
Luisa B. Briggs, alias Jane Doe	Carper Road East Pond Heights, Narragansett, R.I.

AFFIDAVIT

Your affiant upon oath states that he has reason to believe and does believe that grounds for issuance of an arrest warrant exists and states the following facts on which such belief is founded:

Persuant to a court ordered wire intercept signed by the Honorable Anthony A. Giannini, Presiding Justice of the Superior Court of the State of Rhode Island and Providence Plantations, on November 25th 1980 and a extention order signed on December 23rd, 1980 giving permission for members of the Rhode Island State Police to intercept oral communications over telephone number 401-789-3108.

See attached affidavit, attached there to and made part of:

IF SPACE IS NOT SUFFICIENT, CHECK (X) HERE AND [X] ATTACH ADDITIONAL INFORMATION

AFFIANT

x Det. Edward P. Malley

SUBSCRIBED AND SWORN TO BEFORE ME AT CITY TOWN	DATE	JUDGE OF DISTRICT COURT, JUSTICE OF SUPERIOR COURT OR ANY OTHER AUTHORIZED OFFICER
W. Hampton	7-15-81	x

ARREST WARRENT

STATE EX REL	COUNTY	DATE OF BIRTH	DIVISION	WARRANT DATE
~~xxxxxx~~ Member of the Rhode Island State Police	Washington	5-12-28	4th RHODE ISLAND DISTRICT COURT	7-15-81

NAME OF DEFENDANT	ADDRESS NO STREET CITY TOWN STATE
Luisa B. Briggs, alias Jane Doe	Carper Road East Pond Heights, Narragansett, RI

TO ANY AUTHORIZED OFFICER: Affidavit (and complaint) having been made to me under oath, and as I am satisfied that there is probable cause for the belief therein set forth that grounds for issuing an arrest warrant exists, you are hereby commanded to arrest the defendant forthwith and to bring him before a judge of this court without unnecessary delay.

BAIL	SURETY	DATE SIGNED	AUTHORIZED OFFICER	JUDGE OF DISTRICT COURT OR ANY
$	[ ] with [ ] without	7-15-81	x	

RETURN OF SERVICE

I have apprehended the within named defendant and have presented him/her before the court as herein commanded.

SERVICE	MILEAGE	DATE OF RETURN	AUTHORIZED OFFICER
$	$	3-11-11	x

CP 81-0577

2 Sc 71.64

Page 2 of the arrest affidavit on Luisa B. Briggs, alias Jane Doe, DOB: 5/12/28 of Carper Road, East Pond Heights, Narragansett, Rhode Island.

On December 20, 1980, at 5:30 p.m. an incoming call was received to Paul Driscoll recorded on Reel 7, Side 1, Footage 30-48. This unidentified male calls Paul Driscoll and states, "This is Doctor Shotgun." General conversation reference to a party they went to last night. Caller states, "I can't believe I was token in front of Jimmy Briggs." Caller states that he passed it to Luisa. Caller and Paul talk about another party going on tonight. Paul says that Nancy was sitting in his lap rolling her thing.

On the same date at 5:56 p.m., Reel 7, Footage 48-59. Male subject Scott calls Paul Driscoll. General conversation about a party at Jaime's parents' home. Also, that they went there last night. They are referring to Jaime's parents' home, that is James and Luisa Briggs. Further, in regard to the conversation at 5:30 p.m. this unidentified male who called himself Doctor Shotgun stated that he was token in front of Jimmy Briggs. In your affiant's experience, he was smoking a marijuana cigarette in front of James Briggs. He then states that he passed it to Luisa. Luisa would be Luisa Briggs. He passed her a marijuana cigarette. Where Paul states that Nancy was sitting on his lap rolling her thing, she was rolling a marijuana cigarette.

Therefore, your affiant requests that an arrest warrant be issued for Luisa B. Briggs, alias Jane Doe, DOB: 5/12/28.

2-25-81

RHODE ISLAND AND PROVIDENCE PLANTATIONS

77

DISTRICT COURT
FELONY COMPLAINT

COMPLAINT NO. 81-00973

▼ COMPLAINING AGENCY COMPLETE AREA IN HEAVY OUTLINE ▼

STATE, EX REL	COUNTY	DIVISION	OFFENSE DATE
Member of the R.I. State Police	Washington/S. Kingstown	4th DISTRICT COURT	12-19-80

VS. DEFENDANT	DEFENDANT'S ADDRESS	PHONE #
Luisa B. Briggs, alias Jane Doe	Narragansett Carper Road, East Pond Heights Narragansett, R.I.	

DATE OF BIRTH	SOCIAL SECURITY NO.	DRIVER'S LICENSE NO	OTHER I.D (M.V LIC. NO.)
5-12-28			

COMPLAINANT	COMPLAINANT'S ADDRESS
Rhode Island State Police	

TO ANY JUDGE OR AUTHORIZED JUSTICE OF THE PEACE FOR SAID DIVISION: The here named complainant on oath, in the name and behalf of the State, says that the here named defendant (alias John/Jane Doe) on the date stated with force and arms acted in violation of law and wherefore the complainant prays that a summons or arrest warrant may issue to apprehend the defendant and that he be held to answer this complaint and be further dealt with according to law.

COMPLAINT

Luisa B. Briggs, alias Jane Doe and James Briggs, alias John Doe, and Paul S. Driscoll, alias Paul Doe, did unlawfully conspire to violate the uniform controlled substance act of the State of Rhode Island by having in their possession a controlled substance, Schedule 1 to wit cannabis marijuana in violation of Section 21-28-4.08 of the General Laws as amended.

CONNECTED MISDEMEANOR CHARGE(S), IF ANY:

CO-DEFENDANT(S), IF ANY:

James Briggs, Paul S. Driscoll

STATUTE(S) VIOLATED	LOCATION OF OFFENSE
	South Kingstown Narragansett

AUTHORIZED OFFICER	DATE SIGNED	TITLE	AGENCY
X		Detective	State Police

SWORN TO BY AFFIANT WHO RECOGNIZED ☐ WITH ☐ WITHOUT SURETY	DATE SWORN	JUDGE/JUSTICE OF THE PEACE AUTHORIZED TO ISSUE WARRANTS
		X

▼ INITIAL APPEARANCE ▼

INITIAL APPEARANCE DATE	ARRAIGNMENT DATE	BAIL	JUDGE/JUSTICE OF THE PEACE
		$	X

▼ ARRAIGNMENT ▼

ARRAIGNMENT DATE	ADVISED OF RIGHTS ☐ YES ☐ NO	BAIL	CONTROL DATE	
		$		
ATTORNEY ☐ PRIVATE ☐ ASSIGNED	NAME		JUDGE	
			X	

▼ BOUND OVER ▼

BOUND OVER ☐ YES ☐ NO	DATE	BAIL	WITNESS FEES	COSTS	JUDGE
		$	$	$	X

DISPOSITION

DISPOSITION DATE	INDICTMENT/INFORMATION NO.	FILED/REJECTED ON
☐ CRIMINAL HISTORY BACKGROUND INFO.	CASE DISPOSED—NO COSTS	JUDGE X

POLICE COPY

for Exhibit 1

PLAINTIFFS' EXHIBIT 4 RHODE ISLAND STATE POLICE

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NARCOTICS UNIT

Driscoll 787-3108

NO.	TIME	IN	OUT	TELEPHONE NUMBER	IN	READING	INT	MESSAGE
1.	9:35AM	✓			N	17-21	RXY	Tony calls Paul, says he's getting married after the holidays. Tony asks Paul how much does he owe on the policy. Paul says I'll have to check it. Paul asks Tony if he'll be home next week, how about Monday. Paul says I'll probably see you after the
2.	9:44a	✓			N	21-25	RXY	Jaime's mother calls for Jaime. mother says she called a wants Jaime to take the car home, making check sure.
3	11:30AM		✓	[illegible]	N	25-30	RXY	Jaime calls Wayside for John. Asked me to get message to have John call his parents home
4.	12:40PM	✓			—	30-3C	WJZ	No answer
5	5:30PM	✓			IV	30-48	Spon	male party calls Paul states this is Jay Shotgun - General conversation re: a party they went to last night - spot monitored - caller says I can't believe I was taken in front of Jimmy Greggs - caller states he "pimped" it to Jessica - talk about fans. Talk about another party going down tonight - Paul says Jimmy was sitting in his lap rolling her thing - conversation is general - caller says he will pick up Paul at 6:30 tonight to go to the other party.
6	5:56PM	✓			4	48-59	WJZ	Scott the Paul. Gen. Con. Spectron P. Corey & party at Jaimes parents home went to one last night also. Everything u can imagine was going on. Cole then trying to make Jaimes (Bungalow) Bear & Carolyn

(A) 81-0577

5C 4 2/1/84

7 SIDE 1 DATE 2/20/84 Saturday TROOPER Edward Driscoll

BK Sawyer

WJ Lynch

Page 2

RHODE ISLAND STATE POLICE

NARCOTICS UNIT

D. Mizell 789-3103

NO	TIME	IN	OUT	TELEPHONE NUMBER	IN	READING	INT	MESSAGE
6 CONTD		✓						GOING TO PARTY. LOT OF RELATIVES. SCOTT + PAUL TALK OF GOING TO NASSAU POSSIBLY WITH JAIME + MIMI. PAUL GOOD IDEA

7 SIDE 1 DATE 12-20-80 DAY SAT. TROOPER W. J. Zgurski

Office Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1586

In The
Supreme Court of the United States
October Term, 1984

EDWARD MALLEY AND
THE STATE OF RHODE ISLAND,
Petitioners,

VS.

JAMES R. BRIGGS AND
LOUISA BRIGGS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

ARLENE VIOLET
Attorney General of the
State of Rhode Island

*ANN M. SHEADEL
Assistant Attorney General
72 Pine Street
Providence, RI 02903
(401) 274-4400

Counsel for Petitioners

**Counsel of Record*

PETITION FOR CERTIORARI FILED APRIL 5, 1985
CERTIORARI GRANTED MAY 28, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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45 pp

QUESTION PRESENTED FOR REVIEW

Whether a police officer can be held liable under 42 U.S.C. § 1983 for damages resulting from an arrest, when the only allegation made against the police officer is that he knew or should have known that the affidavit that he submitted to a neutral and detached magistrate in an application for an arrest warrant lacked sufficient facts to establish probable cause for the arrest, even though the neutral and detached magistrate issued the arrest warrant based upon his finding that probable cause for arrest existed.

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No. 84-1586

In The
Supreme Court of the United States
October Term, 1984

EDWARD MALLEY AND
THE STATE OF RHODE ISLAND,

Petitioners,

VS.

JAMES R. BRIGGS AND
LOUISA BRIGGS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the First Circuit, reported at 748 F.2d 715, is reproduced in Appendix A, pp. App. 1 - App. 18, in the Petition for Writ of Certiorari. The Judgment of the United States Court of Appeals for the First Circuit is repro-

duced in Appendix D, p. App. 29, in the Petition for Writ of Certiorari.

The unpublished Order of the United States District Court for the District of Rhode Island granting petitioner Malley's Motion for Directed Verdict is reproduced in Appendix B, pp. App. 19 - App. 23, in the Petition for Writ of Certiorari. The Judgment of the United States District Court for the District of Rhode Island is reproduced at page 68 of the Joint Appendix.

The unpublished Opinion and Order of the United States District Court for the District of Rhode Island denying respondents' Motion for a New Trial or, in the Alternative, for Relief from Judgment is reproduced in Appendix C, pp. App. 24-App. 28, in the Petition for Writ of Certiorari.

JURISDICTIONAL GROUNDS

The Judgment of the United States Court of Appeals for the First Circuit was entered on November 19, 1984. The Petition for Writ of Certiorari was filed on April 5, 1985, and was granted on May 28, 1985. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

> § 1983. Civil Action for Deprivation of Rights.
>
> Every person who, under color, of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

—o—

STATEMENT OF THE CASE

In December of 1980, the Rhode Island State Police were conducting a court-authorized wiretap on the telephone of Paul Driscoll in connection with a narcotics investigation. (J.A. 44.) At that time Paul Driscoll was living with Jaime DeJoira, the daughter of respondents James and Louisa Briggs (J.A. 41.) Mr. and Mrs. Briggs

met Paul in November of 1980 (J.A. 41), and after that time he frequently came to their home for dinner, for visits, and to attend parties. (J.A. 42.)

On the evening of December 19, 1980, Mr. and Mrs. Briggs attended a party at a friend's house. (J.A. 24.) When they returned home at approximately midnight or 12:30 a.m. (J.A. 24, 28), there were four couples in their living room sitting by the fire in the fireplace (J.A. 28, 39): Jaime DeJoira and Paul Driscoll; Sandy, another of the Briggs' daughters, and her fiance, Scott Paul; Carolyn Coleman, the Briggs' niece, and her husband, David; and another unidentified couple. (J.A. 28, 39.) Mr. Briggs believes that he communicated with these couples for "five minutes or so," that he "probably fell asleep" in his chair, that he was "there maybe an hour or so," and that his wife stayed and talked with the couples "[m]aybe five minutes longer" than he did. (J.A. 29.) Mrs. Briggs believes that she stayed with the couples "maybe a total of fifteen minutes." (J.A. 40.)

On December 20, 1980, during the regular monitoring by the State Police of the calls on Paul Driscoll's telephone, Officer Miranda noted on the call log sheet that a call was received by Paul at 5:30 p.m. (J.A. 53-55, 78.) Officer Miranda wrote on the call log sheet that "male party calls Paul states this is Dr. Shogun—General conversation re. a party they went to last night—spot monitored—caller says I can't believe I was token [*sic*] in front of Jimmy Briggs—caller states he passed it to Louisa—caller and Paul talk about another party going down tonight—Paul says Nancy was sitting in his lap rolling her thing—conversation is general—caller says he will pick up Paul at 6:30 tonight to go to the other party."

(J.A. 54-55, 78.) At 5:56 p.m. Officer Lynch noted on the call log sheet that "Scott calls Paul . . . P going to party at Jaimes parents house. Went to one there last night also. Everything u can imagine was going on. Coleman trying to make Louisa (Bungershort) Dave & Carolyn. Going to party. Lot of relatives. . . ." (J.A. 78.)

Pursuant to Rhode Island procedure,[1] petitioner Edward Malley reviewed the logged information regarding these telephone calls to determine if the calls should be considered incriminating calls. (J.A. 58.) At the time of this review, petitioner Malley held the rank of Trooper with the Rhode Island State Police, was assigned to narcotics duty in the Detective Division, and was supervising the wiretap investigation of Paul Driscoll. (J.A. 44-45.) After reviewing the logged information regarding these calls with his partner, Trooper Malley concluded that an incriminating call had been made regarding Mr. and Mrs. Briggs because of the drug terminology used in the first call: "token" indicates smoking marijuana and "rolling

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[1]When the Superior Court of Rhode Island authorizes a particular wiretap on a telephone, the procedure is as follows:

> [C]alls on, to or from that phone are then monitored and logged by the State Police. Calls which are considered to be incriminating by the State Police are reported to the superiors at the State Police. The officer at the State Police in charge of the investigation reviews the calls considered to be incriminating and decides which calls he believes provide the basis for preparing and submitting an affidavit and arrest warrant and District Court Complaint. The officer then prepares the affidavit and the arrest warrant and the District Court complaint. These are submitted to the Judge of the District Court, who reviews both of them and, either signs or refuses to sign both of them.

(J.A. 51-52.)

her thing" indicates rolling a marijuana cigarette. (J.A. 57-58.)

Accordingly, Trooper Malley prepared an Affidavit and Arrest Warrant and a District Court Felony Complaint for both James R. Briggs and Luisa [*sic*] B. Briggs which he presented to Judge John J. Cappelli of the Rhode Island District Court for the Judge's review and either approval or disapproval. (J.A. 45-49, 52, 72-74, 75-77.) In his Complaints, Trooper Malley alleged that Mr. and Mrs. Briggs "did unlawfully conspire" with Paul Driscoll "to violate the uniform controlled substance act of the State of Rhode Island" by having marijuana in their possession. (J.A. 74, 77.) In his affidavits, Trooper Malley set forth the information in his possession regarding the telephone calls concerning Mr. and Mrs. Briggs and his interpretation of the drug terminology in the first call.[2]

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[2]Trooper Malley's Affidavit regarding James R. Briggs states:

Your affiant upon oath states that he has reason to believe and does believe that grounds for issuance of an arrest warrant exists [*sic*] and states the following facts on which such belief is founded:

Persuant [*sic*] to court ordered wire intercept . . . .

On December 20, 1980, at 5:30 p.m. an incoming call was received to Paul Driscoll recorded on Reel 7, Side 1, Footage 30-48. This unidentified male calls Paul Driscoll and states, "This is Doctor Shotgun" [*sic*]. General conversation reference to a party they went to last night. Caller states, "I can't believe I was token in front of Jimmy Briggs." Caller states that he passed it to Luisa [*sic*]. Caller and Paul talk about another party going on tonight. Paul says that Nancy was sitting in his lap rolling her thing. On the same date at 5:56 p.m., Reel 7, Footage 48-59. Male subject Scott calls Paul Driscoll. General conversation about a party at Jaime's parents' home. Also, that they went there last night. They are referring to Jaime's

(Continued on following page)

On February 25, 1985, Judge Cappelli signed the District Court Felony Complaints and the Affidavits and Arrest Warrants for Mr. and Mrs. Briggs, indicating on each Arrest Warrant:

> TO ANY AUTHORIZED OFFICER:
>
> Affidavit (and complaint) having been made to me under oath, and as I am satisfied that there is probable cause for the belief therein set forth that grounds for issuing an arrest warrant exists [*sic*], you are hereby commanded to arrest the defendant forthwith and to bring him before a judge of this court without unnecessary delay.

(J.A. 46, 47, 72, 75.)

(Continued from previous page)

> parents' home, that is James and Luisa [*sic*] Briggs. Further, in regard to the conversation at 5:30 p.m. this unidentified male who called himself Doctor Shotgun [*sic*] stated that he was token in front of Jimmy Briggs. In your affiant's experience, he was smoking a marijuana cigarette in front of James Briggs. He then states that he passed it to Luisa [*sic*]. Luisa [*sic*] would be Luisa [*sic*] Briggs. He passed her a marijuana cigarette. Where Paul states that Nancy was sitting on his lap rolling her thing, she was rolling a marijuana cigarette.
>
> Therefore, your affiant requests that an arrest warrant be issued for James R. Briggs, alias John Doe, DOB: [blank]

(J.A. 72-73.)

Trooper Malley's Affidavit regarding Luisa [*sic*] B. Briggs is the same as the Affidavit regarding James R. Briggs, except that the last sentence of the Affidavit regarding Mrs. Briggs reads:

> Therefore, your affiant requests that an arrest warrant be issued for Luisa [*sic*] B. Briggs, alias Jane Doe, DOB: 5/12/28.

(J.A. 75-76.)

Pursuant to these Arrest Warrants, on March 19, 1981, at approximately 5:45 a.m., Mr. and Mrs. Briggs were arrested and taken to the Wickford State Police barracks (J.A. 14-17) where they remained until approximately 2:00 or 2:30 p.m. (J.A. 19.) During their stay at the barracks, they were taken into a large room in which other people who also had been arrested were being held (J.A. 18, 26, 34), including Jaime DeJoira, Paul Driscoll, and David Coleman. (J.A. 25-27, 41.)

At approximately 2:00 or 2:30 p.m., Mr. and Mrs. Briggs travelled by bus with the other arrestees to the West Kingstown Courthouse (J.A. 19, 21), where Mr. Briggs met with his attorney, who had been waiting for him at the Courthouse for a scheduled land transaction. (J.A. 21, 22.) Mr. and Mrs. Briggs were brought into the courtroom for their arraignments and individually came before the Judge and pleaded not guilty. (J.A. 22-23, 38.) After Mr. and Mrs. Briggs signed for their bonds (J.A. 23, 38), they were driven home by Jaime DeJoira's ex-husband. (J.A. 42.) The charges against Mr. and Mrs. Briggs were later dropped, because the grand jury to which the charges were presented returned no true bill against Mr. and Mrs. Briggs. (J.A. 4.)

On December 18, 1981, James and Louisa Briggs filed a complaint, under 42 U.S.C. § 1983, against Edward Malley and the State of Rhode Island in the United States District Court for the District of Rhode Island, alleging that their rights under the Fourth and Fourteenth Amendments had been violated.[3] (J.A. 2-8.) Specifically, Mr.

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[3]Mr. and Mrs. Briggs also alleged pendent state claims of malicious prosecution, defamation, and false imprisonment. (J.A. 5-8.)

and Mrs. Briggs alleged that they were unlawfully arrested and imprisoned because the arrest warrants under which they were arrested were constitutionally deficient in that the affidavits submitted in support of the warrant applications did not set forth sufficient facts to establish probable cause to believe that Mr. and Mrs. Briggs had committed the offense alleged. (J.A. 3-4.) Mr. and Mrs. Briggs alleged that they are entitled to $1,000,000 in compensatory damages and $1,000,000 in punitive damages from Trooper Malley because of this alleged violation of their constitutional rights. (J.A. 4.)

In his answer to this complaint, Trooper Malley asserted: (1) that he has absolute immunity and/or the qualified immunity of good faith from this action; and (2) that the complaint fails to state a claim upon which relief may be granted, in that the facts alleged do not support a claim under 42 U.S.C. § 1983. (J.A. 9)

The case was tried before a jury in February of 1984. (J.A. 12.) At the close of plaintiffs' evidence, defendants Malley and the State of Rhode Island moved for a directed verdict. (Tr. 141.) The trial judge granted the motion as to both defendants. (J.A. 68.) Mr. and Mrs. Briggs filed a Motion for New Trial or, in the Alternative, for Relief from Judgment, which was denied by the trial judge. (J.A. 69, Pet. App. 24.) In ruling in favor of Trooper Malley on both of these motions,[4] the trial judge determined that a policeman who believes the facts in his arrest warrant affidavit to be true and who sub-

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[4]Because Mr. and Mrs. Briggs did not appeal the Judge's ruling in favor of the State of Rhode Island, that ruling is not at issue here and accordingly is not discussed.

mits such an affidavit to a neutral and detached judge for a probable cause determination cannot be held liable under 42 U.S.C. § 1983 for two reasons: (1) such a policeman is immune from liability; and (2) the judge's intermediate decision to issue an arrest warrant breaks the causal chain and insulates such a policeman from liability. (Pet. App. 19-28.)

Mr. and Mrs. Briggs appealed from the judgment in favor of Trooper Malley. The Court of Appeals for the First Circuit reversed the trial judge, deciding that "judicial approval of a warrant cannot act as an absolute bar to the § 1983 liability of the officer who obtained the warrant." *Briggs v. Malley*, 748 F.2d 715, 721 (1st Cir. 1984) (Pet. App. 16). The court emphasized that § 1983 liability will attach where an officer is " 'constitutionally negligent,' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause . . . ." *Id.* On the other hand, in those cases in which "the sufficiency of the facts fall into the grey area appropriate for judicial determination, submission of the affidavit to a magistrate will insulate the officer from liability." *Id.* Because the Court of Appeals determined that the district court had improperly directed a verdict for Trooper Malley, the court reversed and remanded for a new trial.

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SUMMARY OF ARGUMENT

Petitioners ask this Court to adopt the rule that a police officer cannot be held liable under 42 U.S.C. § 1983 for damages resulting from an arrest, when the only alle-

gation made against the police officer is that he knew or should have known that the affidavit that he submitted to a neutral and detached magistrate in an application for an arrest warrant lacked sufficient facts to establish probable cause for the arrest, even though the neutral and detached magistrate issued the arrest warrant based upon his finding that probable cause for arrest existed. This request is based on two alternative grounds.

I. First, a police officer whose only alleged misconduct is that he submitted an allegedly insufficient affidavit to a neutral and detached magistrate in an application for an arrest warrant should be absolutely immune from liability under 42 U.S.C. § 1983. This absolute immunity should be applied to a police officer in this situation because the function that he is performing in this instance is analogous not only to the common law function performed by the prosecuting complainant but also to the common law function performed by the prosecuting attorney in initiating a criminal prosecution. Because both of these functions historically have been accorded absolute immunity, and because the function performed by the police officer in this sitaution is so functionally similar to these immune functions, the police officer should be accorded absolute immunity for his conduct in submitting an allegedly deficit affidavit to a magistrate in an application for an arrest warrant.

The application of absolute immunity to a police officer in this situation also is supported by important policy and interest considerations. Because the police officer who applies for an arrest warrant is involved in a situation that arouses the most intense emotions in the individuals for whom he is seeking the warrant, and because

these feelings are not easily assuaged by the magistrate's decision to issue the arrest warrant, retaliatory litigation is to be expected. It is just because of the explosive nature of police work, however, that the protection offered by absolute immunity is required to allow the police officer to deal fearlessly with the public pressures and emotions involved in his work. On the other hand, providing such absolute immunity to a police officer will not leave allegedly wronged individuals without sufficient protection, for they have all of the protections inherent in the judicial process as well as alternative remedies of criminal prosecution and state tort actions for civil liability in applicable situations.

Moreover, applying absolute immunity to a police officer in this situation will serve the policy reasons inherent in this Court's stated preference for the use of arrest warrants and the established division of functions between magistrates and police officers. The Court has expressed a strong preference for the use of warrants in making arrests because such use of warrants, by providing for magisterial review and independent determination of the existence of probable cause, provides for the maximum protection of an individual's rights. From this principle the Court has acknowledged that there is a division of functions between police officers and magistrates: the police officer's function is primarily one of ferreting out crime, while the magistrate's function is primarily one of determining the existence of probable cause and issuing the appropriate warrants. By applying to a magistrate for approval of his proposed arrest warrant, a police officer is conducting himself exactly as this Court has strongly indicated that it wants him to conduct himself, thereby assuring the maximum protection of individual rights.

The Court of Appeals' decision, however, ignores the Court's preference and policy in this area and requires that the police officer take on the neutral and detached function of the magistrate. Not only must the police officer make an accurate determination of the existence of probable cause before he applies to the magistrate for an arrest warrant, but the police officer must also assume a role even more skilled in evaluating probable cause than the magistrate. Such a policy is completely at odds with the reasoning of this Court, for it ignores the distinct functions of the magistrate and the police officer and in fact tends to discourage officer applications for arrest warrants.

Accordingly, because the function performed by the police officer in this situation historically has been accorded absolute immunity, because the Court of Appeals' rule is so at odds with this Court's policy of preferring and encouraging police officers to seek warrants from neutral and detached magistrates, and because granting absolute immunity to police officers in this situation will support and is entirely consistent with policy considerations stated by this Court, the Court should grant police officers absolute immunity in this situation.

II. Second, a police officer whose only alleged misconduct is that he submitted an allegedly insufficient affidavit to a neutral and detached magistrate in an application for an arrest warrant has acted in an objectively reasonable manner and is entitled to qualified immunity. Such an application of qualified immunity is consistent with this Court's standard of "objective reasonableness" that is "measured by reference to clearly established law" because a police officer should be deemed to be acting in

an objectively reasonable manner when he conscientiously follows the procedure prescribed by this Court in its stated preference for the use of warrants and in its establishment of the division of functions between magistrates and police officers.

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ARGUMENT

Petitioners ask this Court to adopt the rule that a police officer cannot be held liable under 42 U.S.C. § 1983 for damages resulting from an arrest, when the only allegation made against the police officer is that he knew or should have known that the affidavit that he submitted to a neutral and detached magistrate in an application for an arrest warrant lacked sufficient facts to establish probable cause for the arrest, even though the neutral and detached magistrate issued the arrest warrant based upon his finding that probable cause for arrest existed.[5] Petitioners base this request on two alternative grounds: (1) that a police officer in this situation should be absolutely immune from liability because the "special functions" performed by an officer in such an instance require a full exemption from liability; or (2) that a police officer

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[5]This proposed rule covers only those situations in which the police officer is allegedly mistaken in his belief that the facts submitted to the neutral and detached magistrate constituted probable cause. It would not apply in those situations in which the police officer allegedly misled the magistrate by information in the affidavit that the police officer knew was false or would have known was false except for his reckless disregard of the truth. *See United States v. Leon*, — U.S. —, 104 S.Ct. 3405, 3421 (1984).

in this situation should be qualifiedly immune from liability because it is *per se* reasonable in such an instance for the officer to submit an affidavit and application for arrest warrant to a neutral and detached magistrate for his review.

This Court has stated the policies underlying 42 U.S.C. § 1983 in a very broad way, indicating that these policies "include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann,* 436 U.S. 584, 590-91 (1978). *See also Burnett v. Grattan,* — U.S. —, 104 S.Ct. 2924, 2931 (1984). Despite these broadly stated policies, and although § 1983 has no immunities on its face, this Court has "consistently construed" that statute "as not intending wholesale revocation of the common-law immunity afforded government officials." *Procunier v. Navarette,* 434 U.S. 555, 561 (1978). By enacting this statute,

> Congress . . . expressed no intention to do away with the immunities afforded state officials at common law, and the Court consistently has declined to construe the general language of § 1983 as automatically abolishing such traditional immunities by implication.

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981).

The Court's decisions have recognized two kinds of immunity defenses to § 1983 liability: absolute immunity and qualified immunity. *Imbler v. Pachtman,* 424 U.S. 409, 418-19 (1976). *See also Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Butz v. Economou,* 438 U.S. 478 (1978).[6]

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[6]Although the Court's decisions in *Harlow* and *Butz* deal with the question of the liability of federal officials who are

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Absolute immunity "bars a suit at the outset and frees the defendant official of any obligation to justify his actions," *Gray v. Bell,* 712 F.2d 490, 495-96 (D.C. Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 1593 (1984), if the "official's actions were within the scope of the immunity." *Imbler v. Pachtman,* 424 U.S. at 419 n.13. Qualified immunity, on the other hand, "protects an official from liability only if he can show that his actions did not contravene clearly established statutory or constitutional rights of which a reasonable person in his position should have known." *Gray v. Bell,* 712 F.2d at 496. *See Harlow v. Fitzgerald,* 457 U.S. at 2738-39.

Under either theory of immunity, a police officer should be immune from liability under 42 U.S.C. § 1983 for submitting allegedly legally deficient affidavits to a neutral and detached magistrate in an application for an arrest warrant. Accordingly, Part I of this argument will examine the question of the police officer's absolute immunity in this situation and will show that absolute immunity should be applied to the police officer because: (1) common law immunity existed for the function being performed by the police officer in this instance; and (2) strong policy reasons support granting this absolute immunity. Part II of this argument will examine the ques-

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(Continued from previous page)

sued pursuant to *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), rather than the question of the liability of state officials who are sued pursuant to 42 U.S.C. § 1983, the Court has made it clear that it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz v. Economou,* 438 U.S. at 504. *See also Harlow v. Fitzgerald,* 457 U.S. at 818 n.30.

tion of the police officer's qualified immunity and will show that a police officer in this situation acted in a *per se* objectively reasonable manner and therefore is entitled to qualified immunity.

I.

A Police Officer Should Have Absolute Immunity From Liability Under 42 U.S.C. § 1983 When His Only Alleged Misconduct Is That He Submitted An Allegedly Insufficient Affidavit To A Magistrate In An Application For An Arrest Warrant.

The Court has recognized that "there are some officials whose special functions require a full exemption from liability." *Butz v. Economou,* 438 U.S. at 508. *See also Briscoe v. LaHue,* 460 U.S. 325 (1983); *Harlow v. Fitzgerald,* 457 U.S. at 810-11. These officials are granted such an absolute immunity "not because of their particular location within the Government but because of the special nature of their responsibilities." *Butz v. Economou,* 438 U.S. at 511. Accordingly, the Court has held that absolute immunity applies to judges for their judicial acts, *Stump v. Sparkman,* 435 U.S. 349, 359 (1978); *Pierson v. Ray,* 386 U.S. 547, 554-55 (1967);[7] to legislators for their legislative activities, *Tenney v. Brandhove,* 341 U.S. 367 (1951); to prosecutors for their prosecutorial functions of initiating prosecution and presenting the State's case,

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[7]Because the role of federal agency hearing examiners or administrative law judges is "functionally comparable" to that of a judge, such officials are also absolutely immune from liability for their judicial acts. *Butz v. Economou,* 438 U.S. at 513-14.

Imbler v. Pachtman, 424 U.S. at 430-31;[8] to the President of the United States "for acts within the 'outer perimeter' of his official responsibility," *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982); and to witnesses at trials. *Briscoe v. LaHue*, 460 U.S. at 342-45.

In determining whether the special functions and responsibilities of certain officials qualify them for absolute immunity, the Court has considered whether the proposed immunity meets certain criteria. First, the Court has considered the question of whether the official or the function was "historically accorded" immunity. *Imbler v. Pachtman*, 424 U.S. at 421. If such historical immunity existed, then the Court has considered whether policies and interests support the continuation of the immunity. *City of Newport v. Facts Concerts, Inc.*, 453 U.S. at 259; *Imbler v. Pachtman*, 424 U.S. at 421. After examining these criteria as they apply in the instant case, it will become clear that a police officer should be accorded absolute immunity for his decision to submit an allegedly insufficient affidavit to a neutral and detached magistrate in an application for an arrest warrant.

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[8]Federal agency officials performing functions "analogous to those of a prosecutor," *i.e.*, deciding to initiate proceedings against an individual or corporation, or conducting a trial and presenting evidence on the record to the trier of fact, are also absolutely immune from liability for those functions. *Butz v. Economou*, 438 U.S. at 515-17.

In addition, an attorney employed by the Department of Social Services has been held to be absolutely immune from liability for her act of requesting an arrest warrant from a Judge, because her position and responsibility were similar to those of a prosecuting attorney. *Walden v. Wishengrad*, 745 F.2d 149 (2nd Cir. 1984).

A. The Function Performed By The Police Officer In Submitting An Allegedly Insufficient Affidavit To A Magistrate In An Application For An Arrest Warrant Historically Has Been Accorded Absolute Immunity.

The function performed by the police officer in this matter is the common law function of the prosecuting complainant: placing a complaint about an individual before the magistrate and asking the magistrate to act by issuing a warrant for the individual's arrest. Historically, this function of applying to a magistrate for an arrest warrant was accorded immunity from tort actions at common law if the only allegation of misconduct was that the application was legally insufficient. The "main proposition" at common law was that a prosecuting complainant "is protected by a judicial decision, though erroneous, that the facts alleged by him support the criminal charge . . . ." 21 A.L.R. 2d 643, 662.

> Where a person in good faith lays his complaint before a justice of the peace and calls upon him to act and the justice concludes to issue a warrant, the complainant cannot be made answerable to the accused however mistakenly or erroneously the justice may have acted.

Id., quoting Brueckner v. Frederick, 109 Mo. App. 614, 83 S.W. 775 (1904). *See Madison v. Manter,* 441 F.2d 537, 538 (1st Cir. 1971) ("a private citizen who seeks a warrant

[with an insufficient affidavit] would not be liable"), and cases cited therein. The basis for this rule stems from the injustice of holding the complainant liable because of a judge's mistake; such an action "would not only be grossly unjust but would also be highly injurious to the public interest." 21 A.L.R. 2d 639, 642, *quoting Gogue v. MacDonald*, 35 Cal. 2d 482, 218 P.2d 542 (1950). *See Madison v. Manter*, 441 F.2d at 538 ("any stricter rule would discourage proper action"). This follows from the long-standing common law rule regarding false imprisonment, that "[i]n criminal cases the party who prefers the charge is not liable unless it is made maliciously . . . ; for the law encourages the exposure of crime." M. BIGELOW, LEADING CASES ON THE LAW OF TORTS, 280 (1875). *See also* J. BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW, § 211 (1889) (complainant is not liable if he states the facts to the proper officers and the officers act upon their independent judgment).[9]

Accordingly, under common law principles, a complainant could not be found liable for damages resulting

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[9]This same principle holds true for the tort of malicious prosecution. J. BISHOP, COMMENTARIES OF THE NON-CONTRACT LAW, at 230. Moreover, in a tort action for malicious prosecution, it is a defense that the complainant sought the advice of professional counsel, *i.e.*, a practicing lawyer, "upon the question whether the facts within his knowledge are such as to justify a complaint," and acted "*bona fide* upon the advice given," however erroneous. M. BIGELOW, ELEMENTS OF THE LAW OF TORTS, 83 (1878). *See also* J. BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW, at § 236.

Moreover, the rule "in most jurisdictions" is that "the determinations of a judge acting within his jurisdiction, even if erroneous, are valid and binding until they are set aside under some recognized procedure." *Massachusetts v. Sheppard*, — U.S. —, 104 S.Ct. 3424, 3429 (1984).

from an arrest made with a warrant if the only allegation made against the complainant was that he submitted an affidavit with insufficient facts to establish probable cause to a magistrate who erroneously issued the warrant. Because this Court's immunity analysis rests on "functional categories, not on the status of the defendant," *Briscoe v. LaHue*, 460 U.S. at 342 (footnote omitted), the immunity allowed to lay complainants should also apply to police officer complainants.[10] The function performed by a complainant is the same whether the complainant is a private citizen or a police officer: to bring the facts before the judicial officer for his independent determination of whether probable cause exists and whether the warrant should issue. Therefore, the same immunity should apply to both the private citizen and the police officer when they act in the role of complainant.

In addition, the function performed by the police officer in this situation is very similar to the function performed by a prosecuting attorney in initiating a criminal prosecution, which function is accorded absolute immunity from civil liability. *See Imbler v. Pachtman*, 424 U.S. at 427. The police officer's decision to seek an arrest warrant from a magistrate is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution: both are major decisions regarding whether an individual will face criminal charges and will have to undergo certain criminal proceedings. Once the police offi-

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[10]In *Briscoe*, the Court rejected making a distinction between immunity for ordinary witnesses and immunity for police officer witnesses. The Court found that "considerations of public policy" supported immunity for police officer witnesses. *Briscoe v. LaHue*, 460 U.S. at 342.

cer obtains an arrest warrant for an individual, just as once the prosecutor decides to initiate criminal prosecution, the individual is made a part of the criminal judicial process. Both the police officer and the prosecutor "exercise a discretionary judgment on the basis of evidence presented to them." *Id.* at 423 n.20. Accordingly, the absolute immunity available to the prosecutor at common law for his decision to initiate a prosecution, *id.* at 421-23, should be applied to a police officer who performs the similar function of initiating criminal proceedings by seeking an arrest warrant from a magistrate. *See Butz v. Economou,* 438 U.S. at 515 (absolute immunity applies to federal agency officials who perform similar functions to those of a prosecutor by initiating agency proceedings against an individual or corporation).

Therefore, because the function performed by a police officer in applying to a neutral and detached magistrate for an arrest warrant was historically accorded immunity at common law, both as a function performed by a prosecuting complainant and as a function performed by a prosecuting attorney, a police officer who performs this function should be granted absolute immunity.

B. Important Policies And Interests Support Providing Absolute Immunity To A Police Officer Who Applies To A Magistrate For An Arrest Warrant.

This Court has recognized that granting absolute immunity to a public official "may impose a regrettable cost on individuals whose rights have been violated." *Nixon v. Fitzgerald,* 457 U.S. at 754 n.37. *See also Butz v.*

Economou, 438 U.S. at 504-05. On the other hand, the Court has recognized that there are instances in which the alternative of qualifying an official's immunity "would disserve the broader public interest." *Imbler v. Pachtman,* 424 U.S. at 427. In attempting to resolve these conflicting interests, the Court has stated its agreement with Judge Learned Hand:

> "As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

Imbler v. Pachtman, 424 U.S. at 428, *quoting Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).

Thus, in determining whether absolute immunity should be applied to a police officer who submitted an allegedly insufficient affidavit to a magistrate in an application for an arrest warrant, the cost on the allegedly wronged individual must be weighed against the broader public interest. Because in this situation the public interest in granting the immunity to the police officer so outweighs the cost to an individual in being barred from damages recovery under § 1983, the police officer should be granted absolute immunity.

1. Traditional policy reasons supporting absolute immunity apply to a police officer performing this function.

In its decision to apply absolute immunity to certain prosecutorial, judicial, legislative, presidential, and wit-

ness functions, the Court has cited several policy reasons to support the application of such immunity to the functions in question. The officials performing these functions are involved in "cases that arouse the most intense feelings in the litigants," *Pierson v. Ray,* 386 U.S. at 554, and in controversies likely to be so intense that they "are not easily capped by a judicial decree." *Butz v. Economou,* 438 U.S. at 512. Resentment at the official decisions in such matters could be expected to erupt into frequent retaliatory litigation, *Imbler v. Pachtman,* 424 U.S. at 425-26, and the officials could find themselves hounded by litigation charging malice or corruption. *Pierson v. Ray,* 386 U.S. at 554. It is just in such intense situations, however, "that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office," *Nixon v. Fitzgerald,* 457 U.S. at 752, *quoting Ferri v. Ackerman,* 444 U.S. 193, 203 (1979), and to exercise the "independence of judgment required by his public trust." *Imbler v. Pachtman,* 424 U.S. at 423. Moreover, facing the possibility of liability for damages "may render an official unduly cautious in the discharge of his official duties." *Nixon v. Fitzgerald,* 457 U.S. at 752-53 n.32. It is essential that these officials be assured that they "can perform their respective functions without harassment or intimidation." *Butz v. Economou,* 438 U.S. at 512.

These same policy reasons apply to the situation in which a police officer applies to a neutral and detached magistrate for an arrest warrant. This is the exact type of official action that arouses the "most intense feelings" in the individuals involved, feelings not "easily capped" by the magistrate's decision that probable cause exists

and that an arrest warrant should issue. Because police officers are on the "front line" and often are more open to public exposure and criticism than even judges and prosecutors, their decisions regarding seeking arrest warrants are even more likely to arouse emotions and to erupt into retaliatory litigation than the decisions of those other public officers. It is just because of the explosive nature of their work in seeking warrants, however, that police officers require the protection offered by absolute immunity to allow them to deal fearlessly with the public pressures and emotions and to meet the public trust reposed in them. A police officer must be able to apply to a neutral and detached magistrate whenever, in his independent judgment, such application is warranted; he should not be intimidated by the fear that he could face civil liability if the magistrate's approval of his warrant request turns out to be erroneous. If the police officer does not receive immunity in such instances, it is likely that "harassment by unfounded litigation" may "cause a deflection of [his] energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler v. Pachtman,* 424 U.S. at 423.

Moreover, providing such immunity to a police officer will not leave allegedly wrong individuals without sufficient protection. "The presence of alternative remedies [to civil liability] has played an important role" in the Court's decisions to provide absolute immunity. *Nixon v. Fitzgerald,* 457 U.S. at 757 n.38. *See also Parratt v. Taylor,* 451 U.S. 527 (1981). These "alternative" remedies include impeachment of the President and federal judges, removal of legislators from office by a vote of

their colleagues, and other formal and informal checks on Presidential action. *Nixon v. Fitzgerald,* 457 U.S. at 757 and 757 n.38. As to the participants in the judicial process who have been granted such functional immunity, *i.e.,* judges, prosecutors, and witnesses, "the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." *Butz v. Economou,* 438 U.S. at 512. For example, a judge's errors may be corrected on appeal, *Pierson v. Ray,* 386 U.S. at 554, while prosecutors' actions often receive close and direct judicial scrutiny, *Gray v. Bell,* 712 F.2d at 501, as well as monitoring by adversaries in the courtroom and restraint by professional obligations. *Butz v. Economou,* 438 U.S. at 512. "Witnesses are, of course, subject to the rigors of cross-examination," *id.,* and all three actors in the judicial process are subject to the penalties of the criminal law. *Id.; Imbler v. Pachtman,* 424 U.S. at 429.

These same considerations apply to a police officer who is applying to a magistrate for an arrest warrant. As soon as the police officer applies to a magistrate for an arrest warrant, the police officer becomes part of the judicial process, with all of the rigors and safeguards that attach to the process. His affidavit and application for arrest warrant are subject to judicial scrutiny and to rejection if they do not meet required standards. Even if an insufficient application is approved by the magistrate and an arrest warrant is issued, the error is still subject to review and correction by other actors within the judicial process: the grand jury, prosecuting attor-

neys, other trial or appellate judges, a jury.[11] In addition, other remedies are available to an individual who alleges that he has been wronged by a police officer's application for an arrest warrant: in certain situations criminal prosecution may be available, as may civil liability in state tort actions.[12] Thus, the numerous safeguards built into the system and the alternative remedies available do reduce the need for private damage actions in this area and provide sufficient protection to allegedly wronged individuals.

Accordingly, the traditional policies requiring absolute immunity to protect an official from the explosive

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[11]This consideration is apparent in this case. Mr. and Mrs. Briggs were arrested on a warrant that they allege lacked probable cause; the grand jury returned a no true bill regarding them. Thus, any damage incurred by Mr. and Mrs. Briggs as the result of this allegedly unlawful arrest was minimized by the protections inherent in the judicial system.

[12]In the instant case, the Court of Appeals expressed concern that:

> [t]he absolute judicial immunity of the magistrate precludes suit against him or her. Were we to permit the interposition of the magistrate between the police officer and the warrant to immunize the negligence of the police officer, such plaintiffs would be remediless.

Briggs v. Malley, 748 F.2d at 720. Although Mr. and Mrs. Briggs may be "remediless" regarding recovering damages under 42 U.S.C. § 1983 if absolute immunity is applied to Trooper Malley in this case, they certainly are not "remediless" in the context used by this Court. As the Court has noted:

> It never has been denied that absolute immunity may impose a regrettable cost on individuals whose rights have been violated. But . . . it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong.

Nixon v. Fitzgerald, 457 U.S. at 754 n.37.

feelings generated by his official actions and to allow him to act without intimidation and harassment, and the presence of the safeguards of the judicial process and alternative remedies to allow sufficient protection to an individual, both point to the soundness of applying absolute immunity to a police officer who submits allegedly insufficient affidavits to a magistrate in an application for an arrest warrant.

2. Applying absolute immunity to a police officer in this situation will serve the policy reasons inherent in this Court's preference for the use of arrest warrants and the established division of functions between magistrates and police officers.

This Court has expressed a "strong preference for warrants" on which to base arrests or searches. *United States v. Leon*, — U.S. —, 104 S.Ct. 3405, 3417 (1984).[13] This preference for warrants stems from the Court's belief that "[a]n arrest without a warrant bypasses the safeguards provided by an objective determination of probable cause," *Beck v. Ohio*, 379 U.S. 89, 96 (1964), because "[t]he war-

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[13]Petitioners disagree with the court below and with respondents regarding the conclusiveness of the Court's ruling in *Leon* regarding the question of a police officer's liability under 42 U.S.C. § 1983. Although we recognize the importance of *Leon* in defining boundaries for the exclusionary rule, and we draw guidance from it concerning the Court's view of the relationship between magistrates and police officers, we do not believe that a case deciding a question of whether evidence should be excluded in a criminal proceeding should be dispositive of a question regarding the civil liability of a police officer under 42 U.S.C. § 1983. For that reason, while recognizing that *Leon* provides guidance for criminal proceedings, we believe that this Court's traditional analysis of § 1983 liability is much more revelant to this case.

rant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime." *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972). This "objective determination" and "independent assurance" of probable cause is provided by the neutral and detached magistrate to whom the application for arrest or search warrant is made. *Id.* Therefore, "[t]o implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). The "classic statement" of this principle, *id.*, is found in *Johnson v. United States*, 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14 (footnote omitted). *See United States v. Leon*, 104 S.Ct. at 3416-17.

This policy decision of the Court to prefer that arrests and searches be conducted pursuant to warrants issued by neutral and detached magistrates recognizes that there is a "reasonable division of functions" between police officers and magistrates, *Baker v. McCollan*, 443 U.S. 137, 145 (1979): the police officer's function is primarily one of ferreting out crime, while the magistrate's

function is primarily one of determining the existence of probable cause and issuing the appropriate warrants. *See United States v. Leon*, 104 S.Ct. at 3420 ("It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment."). Using "terms that apply equally to arrests," the Court has "described the 'very heart of the Fourth Amendment directive' as a requirement that 'where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation.'" *Gerstein v. Pugh*, 420 U.S. at 113 n.12, *quoting United States v. United States District Court*, 407 U.S. 297, 316 (197_).

Underlying the Court's preference for warrants and its division of functions between magistrates and police officers in the warrant process is the Court's belief that the magistrate is, as a general rule, more qualified than the police officer to make the dispassionate and objective determination of whether probable cause exists for an arrest or a search. This qualification of the magistrate is based upon the requirement that a magistrate must be "neutral and detached," a standard that requires "severance and disengagement from activities of law enforcement." *Shadwick v. City of Tampa*, 407 U.S. at 349. *See United States v. Leon*, 104 S.Ct. at 3418. This neutrality and detachment is essential, because

> "the informed and deliberate determinations of magistrates empowered to issue warrants as to what

> searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

Johnson v. United States, 333 U.S at 14 n.3, *quoting United States v. Lefkowitz,* 285 U.S. 452, 464 (1932). In addition to this requirement of neutrality and detachment, a magistrate is required to be "capable of determining whether probable cause exists for the requested arrest or search." *Shadwick v. City of Tampa,* 407 U.S. at 350.[14] Accordingly, because the magistrate is required to meet these two standards, obtaining "magistrate review of the factual justification prior to any arrest" assures the "[m]aximum protection of individual rights." *Gerstein v. Pugh,* 420 U.S. at 113.

Providing that a police officer, who, in good faith, seeks the magistrate's review of the factual justification prior to any arrest and receives the magistrate's approval, is absolutely immune from potential liability under 42 U.S.C. § 1983 for damages resulting from the arrest even though it later is determined that the magistrate's approval was erroneous, not only supports but is entirely consistent with this Court's policy to prefer and encourage such magisterial review. By applying to a magistrate

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[14]Although it is not essential that a magistrate be a lawyer or a judge, *Shadwick v. City of Tampa,* 407 U.S. at 349, 353, a judge or a lawyer normally will provide "the most desirable review of warrant requests." *Id.* at 353. In the instant case, the reviewing magistrate is a Judge of the Rhode Island District Court.

for approval of his proposed arrest warrant, a police officer is conducting himself exactly as this Court has strongly indicated that it wants him to conduct himself. In other words, the police officer has approached the "single-minded protector" of an individual's constitutional rights, *Madison v. Manter,* 441 F.2d at 539, for a review of the officer's factual information and for an independent determination of whether probable cause exists for the arrest. The police officer should be required to do nothing more, for he has sought and followed expert advice in the manner prescribed by this Court, thereby assuring the maximum protection of individual rights.

If the Court of Appeals' decision is left undisturbed, and the police officer can face civil liability for obtaining from a neutral and detached magistrate an arrest warrant that is later determined to be defective for lack of probable cause, this Court's policy to prefer and encourage such magisterial review and to divide the functions in the arrest process between the magistrate and the police officer will be severely undermined. First, such a policy allowing liability totally ignores the reasons why this Court has given the magistrate, rather than the police officer, the primary responsibility for reviewing warrant applications: the magistrate has the better ability to be neutral and detached, because he is independent of the law enforcement activities that place the police officer in the midst of the subjective fray of ferreting out crime. The police officer is not expected to be able to be as objective as the magistrate, and neither should he be, for his function is to be zealous, rather than neutral, and to be actively competitive in fighting crime, rather than contemplatively detached in reviewing factual allegations.

The Court of Appeals' decision, however, requires the police officer to assume this contemplative detachment and neturality of the magistrate, for it requires the police officer to make an accurate determination of the existence of probable cause before the police officer applies to the magistrate for an arrest warrant.[15]

In addition, such a policy allowing police officer liability in this situation ignores this Court's premise that the magistrate is more qualified than the police officer to make a probable cause determination. The Court of Appeals' decision, in fact, reverses this premise, for it requires the police officer to assume a role even more skilled in this area than the magistrate. From now on, according to the Court of Appeals, a police officer must be able to accurately identify the presence or absence

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[15]The Court of Appeals' decision does in fact require this pre-magistrate accurate determination of probable cause by the police officer, because under the Court of Appeals' standard the police officer could face civil liability if he submits an affidavit and warrant to a magistrate, and the magistrate decides that probable cause exists and issues the warrant, but a reviewing court determines that the magistrate was erroneous and that the affidavit did not establish probable cause. Thus, if the police officer is wrong in his legal evaluation of the sufficiency of the facts in the affidavit to establish probable cause, he could face liability.

It is an illusion to argue that the police officer is protected if the question of the sufficiency of the facts in the affidavit falls within the Court of Appeals' "grey area" appropriate for judicial determination. Even if a police officer believes that his case fits within the "grey area" and should be submitted to a magistrate, he still could face liability if a reviewing court disagrees with his assessment that the case fits within the "grey area." It will be almost impossible for a police officer to define the subjective term "grey area" in a way that will help him in his decision-making process in evaluating probable cause.

of probable cause, even though such identification is unable to be made accurately by a neutral and detached magistrate who has been trained in much greater detail than the police officer to make such identification. Such a standard of requiring sounder legal reasoning from a police officer than from a magistrate is ludicrous and completely at odds with the policy and reasoning of this Court.[16] *See United States v. Barker,* 547 F.2d 940, 947 (D.C. Cir. 1976) ("It is neither fair nor practical to hold such officials to a standard of care exceeding that exercised by a judge.").

Moreover, such a policy of liability not only would do nothing to further the Court's policy of encouraging the use of warrants for arrests but would, in fact, tend to discourage such use of warrants. As pointed out in the Brief Amici Curiae of Americans for Effective Law Enforcement, Inc., if a police officer is designated as the "final arbiter" of probable cause, he may be encouraged to forgo the warrant process and to arrest without a warrant, especially if he believes that the situation falls within one of the warrant exceptions. Brief, pp. 6-7. *See also Illinois v. Gates,* — U.S. —, 103 S.Ct. 2317, 2331 (1983). The Court of Appeals' rule gives the police officer no incentive to seek review of a warrant application by a magistrate, for such magisterial review not only

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[16]In fact, if the police officer is required in this way to assume a role even greater than the role of the magistrate, and to perform the magistrate's function even more accurately than the magistrate is required to do, then the police officer should be gra ted the absolute immunity protection that is granted to an official performing such a judicial function. *See Butz v. Economou,* 438 U.S. at 513-14; *Pierson v. Ray,* 386 U.S. at 554-55.

might not help the police officer in his determination regarding the existence of probable cause but also could serve to mislead the police officer into believing that probable cause exists when in fact it does not.

Therefore, because the Court of Appeals' rule is so at odds with this Court's policy of preferring and encouraging police officers to seek warrants from neutral and detached magistrates, and because granting immunity to police officers in this situation will support and is entirely consistent with this Court's policy, the Court should grant police officers absolute immunity in this situation.

II.

A Police Officer Who In Good Faith Applies To A Magistrate For An Arrest Warrant Acts In An Objectively Reasonable Manner And Is Entitled To Qualified Immunity.

This Court's most recent decision regarding the standard by which to judge the qualified immunity available to government officials is *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which the Court held "that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. This standard is one of "objective reasonableness . . . measured by reference to clearly established law." *Id.* (footnote omitted).

The Court of Appeals decided that the *Harlow* standard "should be understood to prohibit conduct which is

'constitutionally negligent.'" *Briggs v. Malley,* 748 F.2d at 718 (Pet. App. 16). In the situation where a police officer submits affidavits in support of an application for an arrest warrant to a judge, the Court defined "constitutionally negligent" to be that situation in which the officer seeks judicial determination of sufficiency of an affidavit if the officer should have known that the facts recited in the affidavit did not constitute probable cause. *Id.* at 721.

Such a policy, while ostensibly relying on the *Harlow* standard, actually conflicts with the basic principles enunciated in *Harlow.* The *Harlow* Court was concerned with defining the standard for qualified immunity as one of "objective reasonableness" that would be "measured by reference to clearly established law." *Harlow v. Fitzgerald,* 457 U.S. at 818. The Court of Appeals' decision, however, is inconsistent with the *Harlow* standard, for it requires in every instance a speculative determination of what the police officer should have known regarding the existence of probable cause in the affidavits submitted to the magistrate. Only by a thorough case-by-case analysis will a court be able to begin to meet the requirements of this standard, and even then it will be a difficult task to accomplish, because "probable cause is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates,* 103 S.Ct. at 2328. *See United States v. Leon,* 104 S.Ct. at 3417 ("Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause . . ."). Such a vague and uncertain standard should not be acceptable under the *Harlow* "objective reasonableness" standard.

On the other hand, in the situation in which a police officer applies to a magistrate for an arrest warrant, and the only allegation of misconduct against the police officer is that he knew or should have known that the facts stated in his affidavit were insufficient to establish probable cause, it should be clear that the police officer acted in an "objectively reasonable" fashion in accordance with "clearly established law." As shown *supra* at pp. 28-38, this Court had made its preference for the use of arrest warrants very clear and has repeatedly emphasized that it is the magistrate's, rather than the police officer's, role to determine whether probable cause for arrest exists. If a police officer conscientiously follows the procedure required by this Court, and submits his application for an arrest warrant to a neutral and detached magistrate for review, he should be found to be "objectively reasonable" in his actions, and therefore immune from civil liability under 42 U.S.C. § 1983, despite any allegation that he knew or should have known that the affidavits that he submitted were legally deficient. Even if it later is determined that the magistrate was wrong in his decision to issue the warrant because probable cause was lacking, the police officer still should be held to be objectively reasonable in his behavior, for "[a]n error of constitutional dimensions may have been committed . . . , but it was the judge, not the police officer[ ], who made the critical mistake." *Massachusetts v. Sheppard*, — U.S. —, 104 S.Ct. 3424, 3429 (1984).

Therefore, according to the "objectively reasonable" standard for qualified immunity, a police officer should be immune from liability when he acts objectively reasonably by submitting an affidavit to a neutral and detached magistrate in an application for an arrest warrant, even though it is alleged that he knew or should have known

that the affidavit was legally insufficient to establish probable cause to arrest.

CONCLUSION

Because of the legal and policy considerations outlined above, the Court of Appeals was incorrect in holding that a police officer is constitutionally negligent, and therefore subject to liability under 42 U.S.C. § 1983, in those situations in which the officer should have known that the facts recited in an affidavit submitted to a magistrate in an application for an arrest warrant did not constitute probable cause. Petitioners therefore request that this Court reverse the decision of the Court of Appeals and adopt the rule that a police officer cannot be held liable under 42 U.S.C. § 1983 for damages resulting from an arrest, when the only allegation made against the police officer is that he knew or should have known that the affidavit that he submited to a neutral and detached magistrate in an application for an arrest warrant lacked sufficient facts to establish probable cause for the arrest, even though the neutral and detached magistrate issued the arrest warrant based upon his finding that probable cause for arrest existed.

Respectfully submited,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

EDWARD MALLEY AND THE STATE OF RHODE ISLAND,
Petitioners,

v.

JAMES R. BRIGGS AND LOUISA BRIGGS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a police officer who charges a person with the commission of a crime and who requests that a judge issue a warrant for the arrest of that person, all under facts which provide no reasonable grounds for concluding that probable cause exists, is nevertheless immunized from liability under 42 U.S.C. § 1983 if the judge issues the requested warrant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1586

EDWARD MALLEY AND THE STATE OF RHODE ISLAND,
Petitioners,

v.

JAMES R. BRIGGS AND LOUISA BRIGGS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondents James Briggs and Louisa Briggs are husband and wife. They are long-time residents of the Town of Narragansett, Rhode Island, having lived there for over thirty years. (J.A. 12, 30). They are prominent and substantial members of the community, well-known and active in civic affairs. Mr. Briggs is a real estate developer and served eight years as the elected tax assessor of Narragansett. He has been active in community affairs as well, having served as the chairman for the heart fund and muscular dystrophy drives and as the president of the Narragansett Chamber of Commerce. (J.A. 13-14). He is also a director and officer of a local bank, the

Pettaquamscutt Credit Union. (R. 3). Both Mr. and Mrs. Briggs enjoyed an excellent reputation in the community (R. 69-71, 137-38) and neither has ever had any involvement with illegal drugs. (R. 30, 54).

On December 20, 1980, Rhole Island State Police intercepted a telephone call on a court-authorized wiretap in connection with a narcotics investigation of one Paul Driscoll, who was a friend of respondents' daughter. (J.A. 39, 44). The call was overheard by Joseph Miranda of the Rhode Island State Police, who noted the substance of the conversation on a call log sheet. (J.A. 78). The call was spot-monitored, that is, the officer intercepting the call turned the recorder off then on again to eliminate recording what he deemed to be general conversation. (J.A. 55-56). The call log sheet states that the caller identified himself as "Dr. Shogun" and that there was a general conversation about a party the preceding night. In the words of officer Miranda, "caller says I can't believe I was token [sic] in front of Jimmy Briggs—caller states he passed it to Louisa—caller and Paul talk about another party going down tonight—Paul says Nancy was sitting in his lap rolling her thing . . ." Officer Miranda noted that the call was non-incriminating. (J.A. 57).

The investigation of Paul Driscoll was being directed by petitioner Edward Malley. Malley was not present when the call from "Dr. Shogun" was intercepted, but discussed the call shortly after with detective Ronald Youngsma, who was working with Malley on the investigation. They determined that the call was in fact an incriminating call because "token" is drug parlance for smoking marijuana and because the phrase "rolling her thing" meant rolling a mari-

juana cigarette. (J.A. 57-58). Solely on the basis of the conversation of December 20, 1980, Malley concluded that James and Louisa Briggs had committed the crime of conspiracy to possess marijuana with intent to deliver. (J.A. 59-60). At this time Malley knew or should have known of the respondents' excellent reputation in the community. Besides the fact that Narragansett is a small town, Detective Captain James Cooke of the Narragansett Police Department, who assisted the Rhode Island State Police in arresting Mr. and Mrs. Briggs (R. 5), testified that he had known them personally for twenty-five years and that they are "outstanding citizens of the town." (R. 60-61).

After forming his conclusions that Mr. and Mrs. Briggs were involved in criminal activity, Malley then prepared an Affidavit and Arrest Warrant form and a District Court Felony Complaint form for Mr. and Mrs. Briggs. The printed form of the Affidavit and Arrest Warrant for James Briggs stated that "Your affiant upon oath states that he has reason to believe and does believe that grounds for issuance of an arrest warrant exists and states the following facts on which such belief is founded." (J.A. 72). Malley then typed an affidavit in which he described the substance of the December 20 call as recorded by officer Miranda and his understanding of the meaning of the drug terminology used. He concluded the affidavit with the statement, "Therefore, your affiant requests that an arrest warrant be issued for James R. Briggs, alias John Doe . . ." (J.A. 73). A similar form was completed for Louisa Briggs. (J.A. 75-76). Malley signed each form as "affiant."

The District Court Felony Complaint forms listed the Rhode Island State Police as "complainant." The printed portion of the form stated, ". . . The here named complainant on oath, in the name and behalf of the State, says that the here named defendant . . . on the date with force and arms acted in violation of law and wherefore the complainant prays that a summons or arrest warrant may issue . . ." Malley then typed in the specific charges against Mr. and Mrs. Briggs and signed the complaint as "authorized officer." (J.A. 74, 77). After preparing the affidavits and court forms, Malley appeared before a judge of the Rhode Island District Court on February 25, 1981, who issued arrest warrants for Mr. and Mrs. Briggs, as well as twenty other individuals. (R. Plaintiffs' Exhibit 3).

Respondents were awakened from their sleep and arrested in their home in the early morning hours of March 19, 1981. They were transported by police car to a State Police barracks, where they were fingerprinted and held in a garage with other arrestees from about 7:00 A.M. to about 2:00 P.M. During this time, mug shots were taken of respondents, both individually and together with other arrestees. (R. 6-9); R. 39-43). At midafternoon, Mr. and Mrs. Briggs were taken by bus to court for arraignment. They were filmed and photographed by the news media as they left the barracks to board the bus and again when they entered the courthouse. (R. 43-45).

In addition to these indignities, Mr. Briggs was further humiliated when the president of the credit union on whose board of directors he had served for twenty-five years asked him to take a leave of absence from the board until the criminal charges were cleared

up. (R. 26-28). This president testified that respondents' arrests were "the talk of the town" and that half of the people who came in to the credit union office asked him about the arrests. (R. 139-140).

The grand jury which considered the charges against Mr. and Mrs. Briggs returned no true bill. (J.A. 4, 10).

Respondents concur with petitioner's statement of the procedural history of this case.

SUMMARY OF ARGUMENT

In determining whether and to what extent an immunity is available to a state official sued under 42 U.S.C. § 1983, this Court has been guided by reference to the common law as it existed at the time § 1983 was enacted. This analysis is premised on the recognition that the drafters of § 1983 were familiar with common law tort principles, including defenses, and intended that those defenses should apply to cases brought under § 1983. Since the statute by its broad terms subjects an entire class of persons to civil suit, only those functions that were immunized from suit under the common law of the late-nineteenth century could have been intended by Congress to be protected from suit under § 1983. In the absence of absolute immunity at common law for the official function at issue, this Court has refused to sanction an absolute immunity under § 1983, thereby declining to engage in the legislative policy-making that such a decision would require.

No immunity existed at common law for the routine police function of accusing persons of crime and procuring warrants for their arrest. Even with respect

to private complainants, the tort of malicious prosecution imposed liability on anyone who initiated criminal proceedings in bad faith and without probable cause when those proceedings terminated in favor of the accused. And the judicial issuance of a warrant, rather than exculpating the complainant from liability, commonly satisfied the first element of the tort's *prima facie* case, the institution of criminal proceedings. The complainant could escape liability by showing the existence of probable cause or the lack of malice, or by proving that he did not impel the proceedings in any way but simply brought the facts to a judicial officer without accusing the suspect or requesting that process be issued. The defenses were entirely factual, having no similarity to the absolute immunities which completely barred at the outset suits against judges, public prosecutors, or witness.

This Court has held, and repeatedly reaffirmed, that "[t]he common law has never granted police officers an absolute and unqualified immunity," *Pierson* v. *Ray,* 386 U.S. 547, 555 (1967), and the Circuit Courts of Appeals have uniformly followed this declaration by applying a qualified immunity to routine police functions in § 1983 actions. Any other rule would subvert the broad remedial and deterrent purposes of § 1983 by exempting an entire class from liability under § 1983 without any basis for concluding that Congress could have intended such a wholesale exemption.

Neither does the defense of prosecutorial immunity for activities "intimately associated with the judicial phase of the criminal process," *Imbler* v. *Pachtman,* 424 U.S. 429, 430 (1976) apply to the police function of accusing persons of crimes and procuring warrants

for their arrest. If this function is assumed to fall under the umbrella of prosecutorial immunity, then it is difficult to think of a police function governed by the Fourth Amendment which will not. For purposes of § 1983, the Fourth Amendment will have become a dead letter, a result that the Congress that enacted § 1983 could not have even considered, much less intended. Tort law recognizes the dissimilarity in functions between prosecutors and police by withholding from the latter the immunity from malicious prosecution suits enjoyed by the former. This Court should similarly reject petitioner's claim to prosecutorial immunity for his actions in accusing respondents of crime and swearing out warrants for their arrest.

A qualified immunity in this case properly balances the remedial and deterrent purposes of § 1983 against the need for effective law enforcement, and the Court of Appeals accurately applied the objective reasonableness qualified immunity standard of *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982). Under this standard, a police officer will be shielded by good faith immunity unless his actions were so flagrant that it can be said that no reasonable police officer would have acted in the same way. Liability will not be imposed on an officer simply because his actions are later found to be erroneous; only errors which are objectively unreasonable will be actionable. An immunity of this scope adequately protects both the police officer and the public by recognizing that an officer cannot function if every error, no matter how reasonable, brings a lawsuit, while at the same time acknowledging that a police officer who is unaccountable for his actions is ultimately above the law.

The *Harlow* standard may not be applied in so simplistic a fashion as to argue that the mere act of applying to a judge for a warrant conclusively establishes objective reasonableness. This is especially so when the arrest planned by the officer does not fall under any of the exceptions to the warrant requirement and the officer is therefore commanded by the Constitution to appear before a magistrate. This Court has recognized that a magistrate's issuance of a warrant does not necessarily establish the good faith of the police officer for purposes of determining whether an exception to the exclusionary rule applies, and so should rule that the mere act of appearing before a magistrate does not establish objectively reasonable conduct for qualified immunity purposes.

This Court should likewise reject any suggestion that the judicial issuance of the warrant severs the causal relationship between petitioner's unreasonable actions and the arrests of respondents. Petitioner directly caused respondents' arrests, and it is a novel theory of causation which would insulate him here. Even if his actions are somehow deemed to be removed from the harm, the causation language of § 1983 establishes a broader causation standard than might be applied in other contexts and clearly encompasses petitioner's acts and their consequences. Under § 1983, petitioner must be held accountable "for the natural consequences of his actions." *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961). The holding below properly imposes liability on him and gives respondents a remedy for the serious deprivation they suffered if the trier of fact finds that he acted in an objectively unreasonable way. This ruling should be affirmed.

ARGUMENT

I. Police Officers Are Not Entitled To An Absolute Immunity From Suit Under 42 U.S.C. § 1983 For Actions Taken To Charge Persons With Crime And Procure Warrants For Their Arrest.

The scope of an immunity available to a state actor under 42 U.S.C. § 1983 will be determined by this Court "[o]nly after careful inquiry into considerations of both history and policy . . ." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981). *See Imbler* v. *Pachtman*, 424 U.S. 409, 421 (1976). This Court will find an immunity applicable under § 1983 only when a review of the common law extant when § 1983 was enacted and the policy reasons for and against the claimed immunity show "that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980) (quoting *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)). Thus, the absolute immunities which have been held to apply to judges, *Pierson* v. *Ray, supra*, legislators, *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), prosecutors, *Imbler* v. *Pachtman, supra*, and witnesses, *Briscoe* v. *LaHue*, 460 U.S. 325 (1983) have been premised on a strong common law tradition of immunity for those functions as well as compelling policy reasons for insulating those functions from liability under § 1983. No absolute immunity has been conferred by this Court on a state actor under § 1983 without a corresponding immunity for the function at common law.

As *Owen* v. *City of Independence* makes clear, the question of immunity under § 1983 is a question of

statutory construction which focuses on discerning whether the Congress that enacted § 1983 intended by the general language of the statute to negate an immunity available at that time under the common law. 445 U.S. at 637; *see also City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 258. This Court has generally held that Congress did not intend to abolish immunities which were firmly established at common law and has therefore construed § 1983 to incorporate such immunities when they are consistent with the purposes of § 1983. However, since the question is one of statutory construction and legislative intent, this Court has refused to impose its own notions of public policy on the statute by engrafting onto § 1983 immunities which have no historical basis and which Congress therefore could not have intended be applicable to § 1983. *Tower* v. *Glover*, 104 S.Ct. 2820, 2826 (1984).

The absolute immunity sought by petitioner has no common-law precursor. Neither is it justified by considerations of policy. Police officers have traditionally been accorded only a qualified immunity for transgressions committed during performance of their police duties and that is the only immunity to which petitioner here is entitled.

A. The Common Law Has Never Recognized An Absolute Immunity Protecting One Who Institutes Criminal Charges Or Procures An Arrest Or Search Warrant

In *Pierson* v. *Ray*, 386 U.S. at 555, this Court stated that "[t]he common law has never granted police officers an absolute and unqualified immunity . . ." Nevertheless, petitioner purports to find support in the common law for his proposition that

one who procured a warrant from a magistrate was immune from suit for the consequences of his act. Petitioner's support, however, is illusory; an action has always been maintainable at common law against one who wrongfully procures a warrant. *Pierson's* characterization of the common law is correct.

In *Wolf* v. *Colorado,* 338 U.S. 25 (1949), this Court catalogued the various remedies available at common law to redress invasions of the right of privacy by searches conducted pursuant to warrant. The Court noted that actions were permitted "against the searching officer. . . . against one who procures the issuance of a warrant maliciously and without probable cause, . . . against a magistrate who has acted without jurisdiction in issuing a warrant, . . . and against persons assisting in the execution of an illegal search . . ." *Id.* at 30 n. 1 In the cases cited by Justice Frankfurter in *Wolf* v. *Colorado,* and in other contemporaneous cases, can be found clear statements of the rule: "[t]hat procuring a search warrant is such a proceeding as may be the foundation of an action for malicious prosecution is not, and cannot be, controverted," *Harlan* v. *Jones,* 16 Ind.App. 398, 45 N.E. 481 (1896); "[a]n action will lie for causing the issuance of a search warrant maliciously, and without probable cause," *Boeger* v. *Langenberg,* 97 Mo. 390, 395, 11 S.W. 223, 224 (1889).[1] *Wolf* also noted that, as of 1949, twenty states allowed some form of statutory sanction against the improper procurement or

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[1] *Accord, Elsee* v. *Smith,* 1 Dowl. & Ry 97 (1822); *Randall* v. *Henry,* 5 Stew. & P. 367, 378 (Ala. 1834); 1 J. Archbold, A Complete Practical Treatise on Criminal Procedure, Pleading, and Evidence 131 (8th ed. 1877).

execution of a search warrant. 338 U.S. at 30, n. 1.

Reference to the tort of malicious prosecution reveals the essential illogic in petitioner's position. To prove a *prima facie* case of malicious prosecution, a plaintiff must prove, among other things, that criminal proceedings were instituted against him. Proof of the issuance of an arrest warrant proves the commencement of criminal proceedings. 1 F. Harper & F. James, The Law of Torts, § 4.3, at 304 (1956); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on The Law of Torts, § 119, at 871 (5th ed. 1984). If the issuance of a warrant satisfies one element of the *prima facie* case, it certainly cannot at the same time provide the malicious prosecution defandant with an absolute immunity to the action.

That the absolute immunity sought by petitioner does not exist under the common law of Rhode Island is shown by *Atkinson* v. *Birmingham,* 44 R.I. 123, 116 A. 205 (1922). The principal defendant in that case was a police officer who had investigated an alleged larceny, reported the facts revealed by his investigation to his superior, and requested that a criminal complaint of larceny be lodged against the plaintiff. The superior filed the complaint and plaintiff was arrested under a warrant issued by the district court. After being acquitted of the criminal charges, plaintiff commenced a malicious prosecution action, which resulted in a directed verdict for defendants on the issue of probable cause. On appeal, the Rhode Island Supreme Court affirmed, finding that, though probable cause was lacking, there was no evidence of malice on the part of the investigating officer. No mention is made in the case of any immunity available to the defendant as a result of the

issuance of the warrant. If such an immunity existed, there would have been no need for the trial court to consider the issue of probable cause or for the appellate court to evaluate the evidence of malice. These issues were reached of necessity because they were the only defenses available. Absolute immunity flowing from the issuance of a warrant was not an issue in the case because it simply did not exist.

Atkinson v. *Birmingham* illustrates the axiom that a plaintiff must prove each element of the *prima facie* case to prevail. With this axiom in mind, petitioner's purported authority for the existence at common law of an absolute immunity can be seen in its proper light. Petitioner's "'main proposition' at common law" (Pet. Br. 19) is acually nothing more than the setttled rule that liability will not follow from the mere presentation of facts to a magistrate.[2] "A distinction must be taken between actually instigating or procuring the institution of criminal proceedings and merely laying information before the law enforcement official without in any way attempting to influence his judgment." 1 F. Harper & F. James, The Law of Torts, § 4.3, at 306 (1956). If a plaintiff cannot prove that the defendant instigated or procured the criminal proceeding then he fails to sustain his burden of proving that it was the defendant, as op-

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[2] Petitioner here did much more than merely present the facts to the district court judge for the judge to decide what action to take. Petitioner concluded in his own mind that respondents had committed the crime of conspiracy to possess marijuana with intent to deliver (J.A. 60), prepared complaints for filing in District Court charging under oath that respondents had committed felonies (J.A. 74, 77), and requested in affidavits the issuance of warrants to arrest respondents (J.A. 73, 76).

posed to the magistrate, who caused the prosecution. Defendant will prevail in this situation, but because of a failure of proof, not because of an absolute immunity.

Brueckner v. *Frederick,* 109 Mo. App. 614, 85 S.W. 775 (1904), quoted by petitioner (Pet. Br. 19), illustrates this distinction. The Court originally reversed a verdict for plaintiff in a malicious prosecution action, ruling that the facts established only that the defendant had placed the facts before a justice of the peace, who had himself made the decision to issue the warrant. On rehearing, however, the Court concluded that defendant's actions were "a sufficient affirmative taking part to place liability on the defendant." *Id.* at 621, 85 S.W. at 777 (opinion on rehearing). The court's discussion shows that the defense was purely a fact-bound issue to be decided upon a review of the evidence, not a principle of absolute immunity which would bar the suit from the outset. The defense is similar to the defenses of probable cause, lack of malice, or advice of counsel available in a malicious prosecution action, all of which rebut the *prima facie* case, are factual only, and must be proven at trial. 1 F. Harper & F. James, The Law of Torts, §§ 4.5, 4.6 (1956); S. Greenleaf, A Treatise on the Law of Evidence, § 457, at 413 (10th ed. 1853); 4 W. Wait, Actions and Defenses, 352-356 (1878).

Thus, the common law provides no support for the absolute immunity petitioner claims under § 1983. To the contrary, actions based on improper conduct in procuring warrants were routinely allowed under the common law. This Court's statement in *Pierson* that police officers were never entitled to an absolute im-

munity under the common law applies with full force to an officer's unlawful procurement of arrest warrants.

B. Qualified Immunity Has Consistently Been Applied To Police Functions Under 42 U.S.C. § 1983.

On many occasions subsequent to *Pierson* v. *Ray*, this Court has repeated its holding there that police officers are entitled only to a qualified immunity. *Scheuer* v. *Rhodes*, 416 U.S. 232, 244-45 (1974) ("When a court evaluates police conduct relating to an arrest its guideline is 'good faith and probable cause.'"); *Imbler* v. *Pachtman, supra*, 424 U.S. at 418; *Procunier* v. *Navarette*, 434 U.S. 555, 561 (1978); *Foley* v. *Connelie*, 435 U.S. 291, 298-299 (1978); *Michigan* v. *DeFillippo*, 443 U.S. 31, 38 (1979); *Briscoe* v. *LaHue*, 460 U.S. 325, 342 (1983). In *Butz* v. *Economou*, 438 U.S. 478 (1978), this Court noted that qualified immunity for federal officials[3] is the rule and that an absolute immunity will apply only in "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of business." *Id.* at 506-507 (footnote omitted). The *Butz* court noted that *Bivens* had left open the immunity question but pointed out that in *Bivens* "we could not have contemplated that immunity would be absolute." The *Butz* court then quoted with approval Mr. Justice Harlan's characterization in *Bivens* of the

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[3] For immunity purposes, this Court has not distinguished between federal officials sued under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and state officials sued under § 1983. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n. 30 (1982).

scope of liability of police officers sued for money damages: ". . . at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct." *Id.* at 505, citing *Bivens, supra,* 403 U.S. at 411 (Harlan, J., concurring). Thus, this Court has consistently and repeatedly declared that a police officer engaged in police activities is entitled only to a qualified immunity.[4]

The Circuit Courts of Appeals have followed this Court's holding in *Pierson* and consistently held that police officers are entitled only to a qualified immunity from liability for constitutional violations. *Carter* v. *Carlson,* 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom. District of Columbia* v. *Carter,* 409 U.S. 418 (1973); *Ricci* v. *Key Bancshares of Maine, Inc.,* No.'s 85-1052, 85-1309 (1st Cir. July 24, 1985); *Guido* v. *City of Schenectady,* 404 F.2d 728 (2nd Cir. 1968), *cert. denied,* 395 U.S. 962 (1969); *Logan* v. *Shealy,* 660 F.2d 1007 (4th Cir. 1981), *cert. denied,* 455 U.S. 942 (1982); *Turner* v. *Raynes,* 611 F.2d 92 (5th Cir.), *cert. denied,* 449 U.S. 900 (1980); *Hanna* v. *Drobnick,* 514 F.2d 393 (6th Cir. 1975); *Joseph* v. *Rowlen,* 402 F.2d 367 (7th Cir. 1968); *Landrum* v. *Moats,* 576 F.2d 1320 (8th Cir.), *cert. denied,* 439 U.S. 912 (1978); *Beard* v. *Udall,* 648 F.2d 1264 (9th Cir. 1981); *Anderson* v. *Reynolds,* 476 F.2d 665

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[4] *Briscoe* v. *LaHue,* 460 U.S. 325 (1983) is not to the contrary. The immunity found applicable there was based on the defendant police officer's function as a witness, for which the common law immunized him. The benefit of the immunity was neither limited to, nor dependent on, defendant's position as a police officer. Moreover, *Briscoe* recognizes that "[policemen] are subject to § 1983 lawsuits for the performance of their other duties, as to which they have only qualified immunity . . ." *Id.* at 342.

(10th Cir. 1973). Current common law principles also accord with this Court's holding in *Pierson*. Restatement (Second) of Torts § 656, comment d (1977) ("The rule stated in this Section [absolutely immunizing public prosecutors from malicious prosecution actions] does not give immunity to a peace officer who swears out a warrant against another in the mistaken belief that his conduct is such as to make him guilty of the offense charged against him."); Prosser and Keeton on The Law of Torts, *supra*, at 1056.

This overwhelming line of authority cannot be disputed. It represents a recognition of the state of the common law at the time § 1983 was enacted, as well as an awareness that a qualified immunity represents the proper balance between the vindication of important constitutional rights and effective law enforcement. This precedent should be adhered to and this balance approved by rejecting petitioner's claim of absolute immunity.

C. A Police Officer Is Not Entitled To Prosecutorial Immunity For Initiating Unconstitutional Arrests.

In an attempt to ride the coattails of the prosecutorial immunity recognized by this Court in *Imbler* v. *Pachtman, supra,* petitioner argues that his function in swearing out a warrant for respondents' arrest is so similar to the function of a prosecutor in instituting a criminal proceeding that he, too, must be absolutely immunized. (Pet. Br. 21-22). Petitioner's argument here, when taken to its logical conclusion, proves to be too much, and it must fall of its weight. Moreover, neither *Imbler,* the common law, nor policy considerations stemming from the structure of the

criminal process support extending prosecutorial immunity to routine police conduct in making arrests.

Since *Bivens* and *Monroe* v. *Pape,* 365 U.S. 167 (1961), there has been no question that police officers may be held answerable in a civil action for warrantless arrests or searches made without probable cause. But, with respect to the manner in which the criminal process is set in motion against a person suspected of criminal conduct, there is no qualitative difference between a warrantless arrest and an arrest under warrant; both cause the apprehension of the suspect and the commencement of the criminal process. Therefore, if an arrest pursuant to warrant is deemed to be so "intimately associated with the judicial phase of the criminal process," *Imbler, supra,* 424 U.S. at 430, as to entitle a police officer to prosecutorial immunity, then so should an arrest without warrant. Under this reasoning, no person wrongfully arrested would ever have an action under § 1983 to remedy the wrong. Certainly Congress could never have forseen or intended such an evisceration of the Fourth Amendment and this absurd result must be avoided by rejecting petitioner's claim to prosecutorial immunity.

The common law does not tolerate the result petitioner presses. The same section of the Restatement which this Court cited in *Imbler* [5] as manifesting common law recognition of prosecutorial immunity contains a comment which expressly limits the applicability of the section to prosecutors and expressly withholds the immunity from police officers. Restatement (Second) of Torts § 656, Comment d (1977). Rather

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[5] 424 U.S. at 424, n.21.

than a simplistic application of an immunity based on position rather than function, this distinction is a recognition of the functional differences between police officer and prosecutor. Contrary to petitioner's assertion (Pet. Br. 21), a police officer's decision to seek an arrest warrant is not a major decision comparable to a prosecutor's decision to institute a prosecution. Because Rhode Island law requires that all non-capital felonies must be prosecuted by indictment or information,[6] petitioner's filing of district court felony complaints and procuring of arrest warrants did nothing more than bring respondents before the district court for purposes of setting bail. The decision by the prosecution to sign an information or present the case to the grand jury remained and was the only major prosecutorial decision existing at any time where the exercise of prosecutorial discretion was required.[7]

Therefore, while the filing of complaints and the procuring of arrest warrants may be part of the criminal process, they clearly are not "intimately associated with the *judicial phase* of the criminal process," *Imbler,* 424 U.S. at 430 (emphasis added), so as to justify conferring prosecutorial immunity on the police officer responsible for the arrests. These traditional police functions are simply not comparable

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[6] R.I. Gen. Laws § 12-12-1.2.

[7] Given the necessity of an indictment or information and the facts that respondents are reputable citizens with longstanding ties to the community and that their home was not searched when they were arrested (J.A. 65), it is difficult to discern any reasonable basis for arresting respondents prior to submission of the cases to the grand jury.

to the judgments judges, prosecutors, or grand jurors must make and so cannot be deemed to be "quasi-judicial" functions entitling the officer to the absolute immunity available to the participants in the actual judicial process. *See Imbler, supra,* 424 U.S. at 423 n. 20. Since prosecutors are generally not absolutely immune when they instigate unconstitutional arrests,[8] police officers such as petitioner must bear the same responsibility when they commit unreasonable errors while performing the same function.

II. A Qualified Rather Than An Absolute Immunity For Policemen Who Initiate Unconstitutional Arrests Properly Balances The Purposes Underlying § 1983 Against The Need For Effective Law Enforcement.

In situations where a particular function of a state official enjoyed immunity at common law, this Court has also required a consideration of the policies served by the immunity and the effect that such an immunity would have on the purposes of § 1983 before the immunity will be given effect to defeat the § 1983 action. *See City of Newport* v. *Fact Concerts, Inc.,* 453 U.S.

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[8] *Imbler* v. *Pachtman,* 424 U.S. at 441 n.6 (White, J., concurring); *Guerro* v. *Mulhearn,* 498 F.2d 1249, 1256 (1st Cir. 1974); *Marrero* v. *City of Hialeah,* 625 F.2d 499 (5th Cir. 1980), *cert. denied,* 450 U.S. 913 (1981); *cf. Mitchell* v. *Forsyth,* 53 U.S.L.W. 4798 (1985) (Attorney General of United States not acting in prosecutorial capacity when authorizing warrantless wiretap.); *Contra, Lerwill* v. *Joslin,* 712 F.2d 435 (10th Cir. 1983). *Walden* v. *Wishengrad,* 745 F.2d 149 (2nd Cir. 1984), relied upon by petitioner (Pet. Br. 18 n.8), is not on point. The prosecutorial function held subject to immunity there was the request for an arrest warrant to secure plaintiff's presence at a hearing which required her testimony, not the procurement of an arrest warrant based on an accusation of crime.

at 259. In addition to the complete lack of common law support for the immunity claimed by petitioner, this consideration of the policies behind the claimed immunity and the purposes of § 1983 leads inexorably to the conclusion that a qualified immunity properly balances these competing concerns.

The important remedial and deterrent purposes of § 1983 are obvious.

> The central aim of the Civil Rights Act was to provide protection to those persons wronged by the " '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Monroe* v. *Pape,* 365 U.S., at 184, 5 L.Ed. 2d 492, 81 S.Ct. 473 (quoting *United States* v. *Classic,* 313 U.S. 299, 326, 85 L.Ed 1386, 61 S.Ct. 1031 (1941)). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe* v. *Pape, supra,* at 172, 5 L.Ed.2d 492, 81 S.Ct. 473.

Owen v. *City of Independence, supra,* 445 U.S. at 650-51. These purposes, coupled with the prominent position accorded personal liberties in our constitutional scheme, have compelled a general application of qualified immunity only. *Butz* v. *Economou, supra,* 438 U.S. at 508. Even when the official is required to exercise discretion to perform his duties adequately, this Court has recognized "that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits

will not unduly interfere with the exercise of official judgment." *Id.* at 506-07.

This balanced accommodation of the purposes of § 1983 and the official's proper performance of discretionary duties has been applied to police practices. This Court has recognized that the qualified immunity to which police are entitled under *Pierson* "rests on the difficult and delicate judgments these officers must often make." *Foley* v. *Connelie,* 435 U.S. 291, 299 (1978). Implicit in the application to policemen of a qualified immunity only is the recognition that the usual judgments they are required to make are not so difficult or delicate, when balanced against the important constitutional rights police may often violate, that only an absolute immunity will accommodate the police function. As Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit has noted, the common-law refusal to grant an arresting officer an absolute immunity "reflects a long-standing judgment that the threat of damage suits does not significantly impede the effective operation of a police department, when the impediment is weighed against the public interest in a tort remedy for police misconduct." *Carter* v. *Carlson, supra,* 447 F.2d at 368 n. 9. This judgment applies with equal if not greater force to suits brought under § 1983 to vindicate important constitutional rights, and compels the conclusion that a qualified immunity properly balances society's need for diligent law enforcement against the preservation and vindication under § 1983 of the guarantees of the Fourth Amendment.

Moreover, an absolute immunity for police with respect to the function of procuring an arrest by

warrant will have harmful consequences for outweighing any purported benefit to vigorous law enforcement. More importantly, an absolute immunity will eliminate one of the main incentives which force an officer to conduct an investigation thoroughly and insure that criminal charges are grounded on a reasonable estimation of probable cause. If accountability for unreasonable errors is erased once a warrant is signed by a judge, police will be encouraged to take their warrant applications to a judge no matter how flimsy the case may be, in the hope that the judge will sign the warrant. Once the warrant is signed, civil accountability will be wiped out and the officer will only have to be concerned with satisfying the good faith exception to the exclusionary rule. *See United States* v. *Leon,* 104 S.Ct. 3405 (1984). Also, if an officer knows that a magistrate's signature on a warrant will insulate him from a damages suit no matter how unreasonable his conduct, he will be encouraged to seek out those magistrates who are more lenient in their examination of warrant applications, with a resulting dilution of Fourth Amendment protections.

Petitioner attempts to blunt the objection that an absolute immunity unjustifiably negates the remedial purposes of § 1983 by arguing that respondents have other remedies available to them. (Pet. Br. 25-27). This argument lacks logic, displays an insensitivity to the injury suffered by respondents, and demeans § 1983. First, in light of petitioner's argument that his actions were immunized at common law, it is illogical to argue that respondents can seek a remedy through a state tort action.[9] If such an action is avail-

[9] Also, to the extent that state law remedies are available against an officer in respondent's position, immunizing him from liability

able, then there can be no historic common law immunity. Petitioner cannot have it both ways. Moreover, this Court has never limited the scope of § 1983 simply because a constitutional wrong could be remedied by an analogous state tort action. Petitioner's implicit argument that § 1983 should be relegated to a back-seat role in the scheme of enforcement of constitutional rights demeans the high purposes of the statute and must be rejected.

Second, it is an affront to both § 1983 and to respondents to suggest that the wrong they suffered at the hands of petitioner was "remedied" by the grand jury's action in returning no true bill against them. That the grand jury refused to indict respondents is small consolation to them since they never should have been arrested and branded as drug dealers in the first place. To say that the dropping of baseless charges makes the victim whole flies in the face of every tenet of our law. Only a judicial declaration that respondents were arrested based on an erroneous and unreasonable determination of probable cause, coupled with an award of compensatory damages, will give them any meaningful remedy to vindicate their rights and restore their reputations.

Finally, a qualified immunity will not place any intolerable or unreasonable burden on police officers with respect to arrests pursuant to warrant. Police are, or should be, trained in the law,[10] and the concept of probable cause is a familiar one which they must

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only under § 1983 may not appreciably lessen his fear of litigation resulting from his actions.

[10] Assuming that police receive training in the legal principles which bear on the performance of their law-enforcement functions,

apply regularly. Police are held accountable for unreasonable errors in determining probable cause to arrest without a warrant, *Bivens, supra; Monroe* v. *Pape, supra,* and there is no reason why the same accountability should not apply where the unreasonable determination of probable cause is made in a warrant application. Indeed, since a warrant application usually can be prepared in a deliberate way, with time to analyze and weigh the facts and consult with more knowledgeable or experienced officers when necessary, a more accurate and reasonable determination of probable cause can be expected of an officer preparing warrant applications than can be expected of a policeman who is faced with a snap judgment which must be made on the street.

Therefore, it is completely fair to hold an officer in petitioner's position to the standard of reasonableness which governs his fellow officer who arrests without a warrant. The Fourth Amendment is a declaration that police practices must be conducted within the bounds of reason. Section 1983 declares that when those bounds have been exceeded, the officer is answerable for his unreasonable conduct. Petitioner's argument attempts to nullify the fundamental limitations imposed by the Fourth Amendment and should be rejected.

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there is even more reason to expect constitutionally correct action from them than there is to expect school administrators, (*Wood* v. *Strickland,* 420 U.S. 308 (1975)), prison administrators, (*Procunier* v. *Navarette,* 434 U.S. 555 (1978)), high executive officials, (*Scheuer* v. *Rhodes,* 416 U.S. 232 (1974)), or state hospital administrators, (*O'Connor* v. *Donaldson,* 422 U.S. 563 (1975)), all of whom have a qualified immunity only, to be aware of and comply with constitutional mandates.

III. The Qualified Immunity Standard Of Harlow v. Fitzgerald Was Correctly Applied By The Court Of Appeals.

The Court of Appeals held that petitioner was not absolutely immunized from suit by the issuance of the warrants he requested and that liability will follow if "an officer is 'constitutionally negligent' that is, where the officer should have known that the facts recited in the affidavit did not establish probable cause." *Briggs* v. *Malley,* 748 F.2d 715, 721 (1st Cir. 1984). This is a correct application of the qualified immunity standard of *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), which, contrary to petitioner's assertions, does nothing to alter the division of functions between judge and policeman or to require a more accurate determination of probable cause by the police officer than is called for from the judge.

Throughout his brief, petitioner characterizes the conduct at issue here as the submission of "an allegedly insufficient affidavit" to a magistrate.[11] This phrasing mischaracterizes the question presented in this action and evidences a fundamental misunderstanding of the holding below. The Court of Appeals clearly required proof of unreasonable conduct before liability could be imposed and unequivocally stated that liability would not be imposed where an officer

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[11] Pet. Br. 11, 13, 17, 19, 21, 23, 25, 31. Both of the *amicus curiae* briefs submitted in support of petitioner repeat this mischaracterization by stating that the ruling below imposes liability when an officer's determination of probable cause is subsequently found to be wrong. Brief of *amici* States at 4; Brief of *amicus* Americans for Effective Law Enforcement, Inc. at 4. *Amici* ignore the pivotal caveat that liability will not be imposed unless the officer's error is objectively unreasonable.

has made an erroneous but reasonable determination of probable cause. *Briggs* v. *Malley, supra,* 748 F.2d at 719. Under the holding below, liability will be imposed on a policeman only when his decisions and actions are so egregious that it can be said that no reasonable police officer, possessing the same facts, would have made the same decisions or taken the same actions. By repeatedly characterizing the conduct at issue here as the submission of "an allegedly insufficient affidavit" without recognizing that the holding below further requires a finding that no prudent policeman would have concluded that probable cause exists, petitioner is erecting a straw man which he can easily topple. The holding below is much narrower than petitioner admits.

The holding of the Court of Appeals, requiring as it does a finding of unreasonable conduct in addition to a finding of a Fourth Amendment violation, correctly applies the objective reasonableness standard of *Harlow* to the good faith defense pleaded by petitioners. *Harlow* declared that state actors having the benefit of a qualified immunity "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. Applying this principle to a situation where the constitutional standard is clearly established and the question is whether a given set of facts satisfies the standard yields a test of good faith immunity which shields respondent from liability if his erroneous determination of probable cause was nevertheless reasonable. The holding below thus accords with *Harlow* by immunizing respondent unless reasonable police officers, faced with the same

facts, would have known there was no probable cause to believe respondents had committed a crime.

This application of the objective reasonableness standard of *Harlow* to a determination of probable cause by a police officer is not novel. In *United States* v. *Leon,* 104 S. Ct. 3405 (1984), this Court used *Harlow*'s objective reasonableness test to set the contours of a good-faith exception to the exclusionary rule, implying that in situations where the good faith exception to the exclusionary rule applies, the objective reasonableness of the officer's conduct will also insulate him from liability under § 1983. *Id.* at 3456 n. 35 (Stevens, J., dissenting). It follows that objective unreasonableness should likewise subject the officer to liability. *See also Stone* v. *Powell,* 428 U.S. 465, 541 (1976) (White, J., dissenting) ("There is little doubt that as far as civil liability is concerned, the rule [excusing an officer from liability] is the same under federal law where the officer mistakenly but reasonably believes he has probable cause for an arrest."); *Michigan* v. *DeFillippo,* 443 U.S. 31, 37-38 (1979).

Application of the *Harlow* standard to probable cause issues will not affect the use of summary judgment in § 1983 actions. *Harlow* reiterated the admonition of *Butz* that " 'insubstantial' suits against high public officials should not be allowed to proceed to trial" and that " 'firm application of the Federal Rules of Civil Procedure' is fully warranted in such cases." *Harlow, supra,* 457 U.S. at 819 n. 35 (quoting *Butz, supra,* 438 U.S. at 507-08). Application of Rule 56(c) of the Federal Rules of Civil Procedure to the question of whether a reasonable policeman would have found probable cause should be no more difficult than its application to any qualified immunity issue.

There will not often be a dispute as to the facts the officer had before him when he made his determination of probable cause and, as this case illustrates, those facts may often be recorded on police or court documents, thereby eliminating any issues as to the facts on which the officer based his decision. Thus, the Rule 56(c) analysis can proceed in routine fashion and will result in summary judgment for the officer when there are no material facts at issue and the court determines that a reasonable policeman could have concluded that probable cause existed.[12]

Contrary to petitioner's assertions, the *Harlow* standard neither requires a more accurate determination of probable cause by a policeman than is made by the magistrate nor confuses the division of functions between judge and policeman. Nothing in the application of the *Harlow* standard alters the rules established by this Court's construction of the Fourth Amendment regarding when an arrest may be made without a warrant and in what situations warrants are required. Petitioner's argument (Pet. Br. 34-35) that the ruling below will encourage police officers to forego the warrant procedure implies that the commands of the Fourth Amendment are of secondary importance to the police and that some special incentive, such as civil immunity, must be held out to them to induce them to obey the Constitution. This

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[12] *Floyd* v. *Farrell*, 765 F.2d 1 (1st Cir. 1985) illustrates the workability of the *Harlow* standard as applied to a good faith defense in probable cause cases. There the Court of Appeals reversed the denial of summary judgment for the defendant police officer and held that the officer was immune because the facts warranted an objectively reasonable belief that the plaintiff was committing a crime when defendant arrested him.

argument is particularly offensive, coming as it does from a law enforcement officer who has presumably sworn to uphold the Constitution of the United States.

The division of functions between police and magistrates is left undisturbed by the ruling below. No more accurate determination of probable cause is demanded of the officer than of the magistrate. The officer is simply required to act reasonably in deciding whether probable cause exists. Since the objective reasonableness test measures his conclusions and conduct against what a reasonably prudent police officer would have concluded and done, the officer is clearly not held up to the standards of a judge or magistrate. And since a reasonable error by the officer will not subject him to liability, he is not required to be more accurate than a magistrate in determining probable cause. The *Harlow* standard as applied to determinations of probable cause requires of the officer neither more than the Fourth Amendment requires nor less than the citizenry has a right to expect. *Harlow*'s application below was correct and should be affirmed.

Neither can it be said that the mere act of applying to a magistrate for the issuance of a warrant is *per se* objectively reasonable conduct entitling the officer to immunity without regard to the facts on which his action was based. This *per se* rule is illogical and exalts form over substance. In cases such as this it is a complete contradiction to say that a police officer acts reasonably when he files charges and seeks arrest warrants under facts which no reasonable police officer would have concluded established probable cause. The reasonableness of an officer's conduct cannot be measured by so simple a gauge as whether he applied to a magistrate for a warrant, a procedure which the

Constitution requires him to follow in certain circumstances. Rather, it is the substance of the facts he has before him and the reasonableness of his conduct in light of those facts which must be measured. *United States* v. *Leon, supra,* 104 S.Ct. at 3422. The mere act of appearing before a magistrate with a warrant application cannot cleanse the underlying substantive wrong in submitting an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown* v. *Illinois,* 422 U.S. 590, 611 (1975) (Powell, J., concurring in part).

IV. The Judicial Issuance Of The Warrants Petitioner Applied For Does Not Break The Causal Connection Between Petitioner's Actions And The Harm Suffered By Respondents.

In granting petitioner's motion for directed verdict the District Court relied in part on the argument that judicial issuance of a warrant "breaks the causal chain" between the procuring officer's conduct and the arrest itself and insulates the officer from liability. *Rodriguez* v. *Ritchey,* 556 F.2d 1185, 1193 (5th Cir. 1977) (*en banc*), *cert. denied,* 434 U.S. 1047 (1978); *Smith* v. *Gonzalez,* 670 F.2d 522, 526 (5th Cir.), *reh'g en banc denied,* 677 F.2d 113 (5th Cir. 1982), *cert. denied,* 459 U.S. 1005 (1982). This argument was properly rejected by the Court of Appeals because it does not comport with the language of § 1983 regarding causation, is illogical, and is at odds with the common law.[13]

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[13] Despite presenting the chain of causation argument in his Petition for Writ of Certiorari as indicative of a conflict among the Circuits, petitioner has abandoned the argument in his brief on the merits. Because the issue was raised in the petition it will be addressed here.

The first point of reference must be the language of the statute. Section 1983 creates a civil action against any person "who . . . subjects, *or causes to be subjected*" any person to a deprivation of constitutional rights. 42 U.S.C. § 1983 (emphasis added). By adding the language "or causes to be subjected," Congress expressed the clear intention to subject state actors to liability even when they did not subject a person to a deprivation but rather took actions which caused another to subject that person to a deprivation. The clause clearly establishes a much broader standard of causation, a standard which is clearly met when an arrest is made pursuant to a warrant for which a police officer applied.

The chain of causation argument is also flawed in that it reduces to an assertion that when a person intentionally causes a certain result and causes or motivates another to act in order to accomplish his purpose, he will be absolved just because the completion of the act and attainment of the desired result required the action of another. This would be an anamolous result. Certain, petitioner's actions in filing charges against respondents and requesting the judge to sign the warrants were a factual cause of the unlawful arrests, because "but for" his actions, there would have been no arrests. Petitioner did everything within his power to arrest respondents, and his efforts were successful. It defies logic to conclude, simply because a judge's approval of the warrant was needed and obtained, that petitioner did not "cause" respondents' arrests.

Neither does the judicial issuance of the warrant have some purgative effect on petitioner's wrongdoing.

The judge who issued the arrest warrants here violated respondents' constitutional rights just as petitioner did, and "[judicial] immunity does not change the character of the judge's action . . ." *Dennis* v. *Sparks*, 449 U.S. 24, 28 (1980). No proponent of the chain of causation rule has ever explained why an erring police officer should benefit from a judge's failure, through inattention or ignorance, to perform his function adequately. Simply put, the causal chain argument posits that two wrongs make a right, a proposition that has no place in any jurisprudence.

The causal chain argument also has no analogy at common law. Since malicious prosecution actions could be brought to remedy arrests or seizures made pursuant to warrant, it would have been illogical to argue that the judicial issuance of the warrant broke the causal connection between defendant's actions in procuring the arrest or seizure and the unlawful arrest or seizure itself. That the common law permitted such actions is a recognition that a person who procures an unlawful arrest or seizure must bear the responsibility for the consequences of his actions. In *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961), this Court stated that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." The natural consequences of petitioner's actions were the arrests of respondents. Because these actions were objectively unreasonable, § 1983 requires that petitioner be held responsible for his unreasonable errors.

CONCLUSION

No person should be stripped of the constitutional protections afforded by the Fourth Amendment, or deprived of the remedy 42 U.S.C. § 1983 provides to redress violation of those protections, unless there are compelling reasons for insulating the wrongdoer from liability. No such reasons exist with respect to a police officer who irresponsibly and unreasonably accuses persons of a felony and swears out warrants under which they are arrested. Because of petitioner's errors, respondents were awakened from sleep and arrested in their home, held in jail, then publicly accused of being drug dealers, all without any mote of justification or suspicion. The ruling below gives respondents the opportunity to prove to the trier of fact that petitioner's clear Fourth Amendment violations were objectively unreasonable. This ruling is correct and should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD MALLEY and THE STATE OF RHODE ISLAND,
Petitioners,

vs.

JAMES R. BRIGGS and LOUISA BRIGGS,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is a law enforcement officer's submission of a truthful and complete warrant application to a neutral and detached judge for a probable cause determination objectively reasonable, good faith conduct so that he has qualified immunity from liability for damages in a 42 U.S.C. § 1983 action for "constitutional negligence" even if the judge's probable cause determination is subsequently declared erroneous?

Did the First Circuit Court of Appeals err in assuming that there was no probable cause for submission of the application for warrant?

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In The

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INTEREST OF THE AMICUS CURIAE

The Attorney General of the State of Illinois shares the concern that an unwarranted and erroneous amplification of tort liability of police officers under 42 U.S.C. § 1983 will hinder vigorous and effective law enforcement. The State of Illinois as *amicus curiae* accordingly joins in the petition for writ of certiorari as well as in the briefs of the other *amici* in this cause and urges the Court to consider the following additional reasons for granting the petition.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PROVIDES AN OPPORTUNITY TO RESOLVE SIGNIFICANT QUESTIONS CONCERNING THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY OF A POLICE OFFICER IN A 42 U.S.C. § 1983 ACTION.

Just last Term this Court decided that the Fourth Amendment exclusionary rule should be relaxed to permit admission of evidence obtained by police officers acting in objectively reasonable reliance on a duly issued warrant, although that warrant was later found to be unsupported by probable cause. *United States v. Leon*, ___ U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The extent to which the same "good faith" concept may redefine qualified immunity of police officers from tort liability under 42 U.S.C. § 1983 is now unclear. However, *dicta* in *Leon* suggests that there may be a new correlative immunity from civil damages for actions undertaken in an objective good faith acquisition of a warrant. 104 S.Ct. at 3456, n.35, 82 L.Ed.2d at 734, n.35 (Stevens, J., dissenting).

The recent *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) decision also provokes a challenge to the traditional definition of officer immunity. Considering an immunity defense for policy-making government officials in that case, this Court approved an objective standard only, thereby rejecting the more subjective *Pierson v. Ray*, 386 U.S. 547 (1967) "good faith" immunity rule adopted from state tort law for police officers. However, this Court in *Harlow* did not have an opportunity to consider police officer immunity or the circumstance of the prior judicial authorization of official conduct embodied in a warrant.

Finally, this Court has twice suggested in recent years an interest in considering the problem of negligent deprivations of constitutional rights by law enforcement officials, but has been unable to do so in the past by the procedural posture presented. *Baker v. McCollan*, 443 U.S. 137 (1979) and *Procunier v. Navarette*, 434 U.S. 555 (1978). There are also the multiple separate opinions and present diversity of views expressed in *Parratt v. Taylor*, 451 U.S. 527 (1981), wherein a prison inmate unsuccessfully raised a procedural due process claim in an attempt to allege negligence of constitutional proportions.

Alternatively stated, there is no present rule concerning the appropriate standard of care for preventing a Fourth Amendment violation by a law enforcement officer. Because that is the issue squarely presented by the instant petition, it presents an opportunity in which to decide the vital issues raised by the *Leon*, *Harlow*, and *Baker* decisions. This petition considers the qualified immunity available to police officers in 42 U.S.C. § 1983 actions when the "constitutional negligence" of an officer, who has reasonably relied on a presumptively valid warrant, has been alleged.

II.

THE OBJECTIVE REASONABLENESS OF AN OFFICER'S CONDUCT IS DEMONSTRATED BY UTILIZATION OF THE WARRANT PROCEDURE.

No matter what the test by which an officer's duty of care to avoid negligent deprivations of constitutional rights is measured, it is highly significant that official action undertaken within the judicial process has been deemed *per se* reasonable in the exclusionary rule context. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978), citing *Katz v. United States*, 389 U.S. 347, 357 (1967) with approval, and *Illinois*

v. Gates, ____ U.S. ____, 103 S.Ct. 2317, 2358, n.9, 76 L.Ed.2d 527, 581, n.9 (1983) (Brennan and Marshall, JJ., dissenting). The warrant is considered *prima facie* proof of reasonable conduct (White, J., concurring), and the warrant accordingly provides a proper measure of protection in any subsequent action for damages. *United States v. Ross*, 456 U.S. 798, 823, n.32 (1982).

In this case then, *amicus curiae* suggests that if, as *Leon* implies, *Harlow v. Fitzgerald* provides the standard, the "objective reasonableness of an officer's conduct" for a *Harlow* qualified immunity is demonstrated in significant part by the decision of the officer to submit his information to a detached and neutral judge for independent review and a judicial determination of probable cause. The need to impose liability in tort when the officer "should have known" there was no probable cause is not applicable when the officer seeks a warrant and does not assume the risk of independent judgement.

III.

THE POLICE OFFICER HAD A SUFFICIENT BASIS TO GO TO A JUDGE FOR A DETERMINATION OF PROBABLE CAUSE FOR AN APPLICATION OF AN ARREST WARRANT.

In this case, there has been no state court or federal district court finding of an absence of probable cause for the Briggs warrant. Nonetheless, the First Circuit assumed the absence of probable cause, presumably based upon the fact of the "no bill" returned by the grand jury. The State of Illinois maintains that the return of the "no bill" does not mean as a matter of law that the police officer did not have enough information to go to the judge nor does it have any bearing whatsoever on the question of whether he was constitutionally negligent in going before the judge.

The determination of whether the officer had sufficient information to apply for a warrant depends on the facts of the individual case. In the case at bar, the officer went before the judge with an affidavit accurately referring to a police call log that identified plaintiffs by name and indicated by its terminology that plaintiffs were in possession of marijuana. The State of Illinois maintains that on these facts the question of the exercise of probable cause is at least debatable and, assuming the First Circuit's standard is correct, it falls within the grey area so that there would be no liability.

No court should declare that the police officer acted unreasonably under the Constitution when he took this question to the judge for decision. A ruling that the officer had enough probable cause to go to a judge is the correct one. Moreover, such a ruling would be desirable for several reasons. First, it would effectuate this Court's policy of encouraging law enforcement officials to use the warrant process. Second, it would avoid a ruling that would have the effect of deterring law enforcement officials from enthusiastically exercising their duties. Third, it would resolve the question at bar without any extension of tort liability to police officers under 42 U.S.C. § 1983.

CONCLUSION

This Court, as recently as the *Leon* and *Sheppard* decisions, has always encouraged police officers to utilize the warrant process to protect constitutional rights. Yet the unfortunate and ironic possibility presented here is that, if an officer's liability in tort is not reduced by the pro-

tection of a warrant duly issued by a judge, then the officer will likely resort to warrantless activity. The State of Illinois as *amicus curiae* respectfully urges this Court to grant *certiorari* to provide clarification of uncertain law and to extend authoritative guidance in this significant area of law enforcement.

Respectfully submitted,

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No. 84-1586 (3)

IN THE

Supreme Court of the United States

October Term, 1984

EDWARD MALLEY AND
THE STATE OF RHODE ISLAND,
Petitioners,

vs.

JAMES R. BRIGGS AND LOUISA BRIGGS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AND SEVENTEEN OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST

The Amici States, through their attorneys general, respectfully offer this brief in support of the petition for a writ of certiorari. This case raises issues of considerable public importance, the resolution of which will directly impact the amici.

First, amici have a significant responsibility to ensure the health, safety and welfare of their citizens through law enforcement activities. This responsibility is carried out through both the direct administration of law enforcement agencies and by providing guidance for the law enforcement agencies

of other governmental units. Second, the states have, in varying degrees, responsibility for defending public officials subject to damage actions pursuant to 42 U.S.C. § 1983. Thus, amici are concerned with protecting public officials from monetary liability to the maximum extent provided by law.

Because of their interest in providing effective law enforcement and in protecting public officials from unwarranted liability, amici submit this brief in support of the petition.

SUMMARY OF ARGUMENT

The Court of Appeals' decision is inconsistent with this Court's principles regarding the functions of police officers and magistrates and with the policies underlying qualified immunity.

This Court has indicated that the responsibility for determining whether probable cause exists, and a warrant should therefore issue, rests with the neutral and detached magistrate issuing the warrant, not with the police officer seeking the warrant. *United States v. Leon,* 104 S. Ct. 3405 (1984). The Court of Appeals, however, has placed the burden of civil liability for an improper determination of probable cause on the police officer. The principles underlying this Court's decision in *Leon* suggest that the Court of Appeals' allocation of responsibility is erroneous.

Similarily, the policies underlying qualified immunity suggest that a police officer should be insulated from liability in the circumstances of this case. The social costs of excessive litigation prompted this Court to establish an objective standard for determining qualified immunity. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The rule proposed by Rhode Island in the instant matter is a logical application of *Harlow* to the peculiar difficulties raised by fourth amendment analysis and application.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S PRINCIPLES REGARDING THE FUNCTIONS OF POLICE OFFICERS AND MAGISTRATES.

This case presents the important and unresolved question of whether a police officer, who believes the facts in his affidavit to be true, and who submits the affidavit to a neutral and detached magistrate, can be held liable for damages under 42 U.S.C. § 1983 when it is subsequently determined that the facts recited in the affidavit did not constitute probable cause. The Court of Appeals for the First Circuit has approved liability in such circumstances. This ruling is inconsistent with this Court's principles regarding the functions of police officers and magistrates, especially as those principles are set forth in the recent case of *United States v. Leon*, 104 S. Ct. 3405 (1984).

In *Leon*, this Court indicated that the responsibility for determining whether probable cause exists, and a warrant should therefore issue, rests with the neutral and detached magistrate issuing the warrant, not with the police officer seeking the warrant. 104 S. Ct. at 3420-21. In placing this responsibility with the magistrate, the Court recognized that "reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause" and the Court thus accorded " 'great deference' to a magistrate's determination." 104 S. Ct. at 3417. The Court reiterated its acknowledgement of the differing roles of police officers and magistrates, the former being "engaged in the often competitive enterprise of ferreting out crime" and the latter providing "the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches." 104 S. Ct. at 3416 (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1971)).

Despite *Leon's* allocation of responsibility, the First Circuit has placed the burden of civil liability for an improper determination of probable cause on the police officer whenever the officer "should have known" that probable cause is lacking. *Briggs v. Malley*, 748 F.2d 715 (1st Cir. 1984). In so holding, the First Circuit relies largely on its perception of the dangers of making a magistrate "the sole protector of the fourth amendment," that is, the dangers of encouraging "sloppy police work" and the danger that the magistrate will be ineffective in his scrutiny. 748 F.2d at 720.

However, as *Leon* itself suggests, it is questionable whether either of these anticipated dangers really exists. First, the proposition that placing responsibility on magistrates encourages sloppy police work assumes what the First Circuit makes explicit in its second conclusion, that magistrates are ineffective. This Court indicated that such an assumption simply cannot be made because

> there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment . . . .

104 S. Ct. at 3418. Rather, the Court has recognized that

> limiting the application of the exclusionary sanction may well increase the care with which magistrates scrutinize warrant applications.

104 S. Ct. at 3419, n. 18.

Second, the First Circuit aparently assumes that a magistrate's review must either completely insulate an officer or cannot insulate him at all. If such insulation were complete under all circumstances, amici might agree that there would be no deterrent to police misconduct and "sloppy police work" would result. However, the magistrate cannot insulate the offi-

cer where the officer either knew that the information in the affidavit was false or acted in reckless disregard for the truth. 104 S. Ct. at 3421-22 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). Thus, an ample deterrent remains to guard against officers' obtaining warrants in completely inappropriate situations.

The First Circuit's decision, when read with *Leon*, poses a difficult dilemma for law enforcement officers. For the purposes of a criminal proceeding, officers, under *Leon*, are encouraged to rely on a neutral and detached magistrate or judge for a determination of probable cause. However, if an officer engages in such reliance, he runs the risk of incurring civil liability under *Briggs v. Malley*, which places responsibility for determining probable cause back on the police. In order to resolve this dilemma, the Court should grant the petition for a writ of certiorari in this case.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE POLICIES UNDERLYING QUALIFIED IMMUNITY.

As this Court recognized in *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982):

> The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.

On the one hand, immunity may be undesirable because "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." 457 U.S. at 814. On the other hand, immunity may be desirable in order to mitigate the social costs of unlimited liability. Such costs include the expenses of litigation, the "diversion of official energy from

pressing public issues," discouraging competent citizens from accepting public office, and the danger of excessively deterring officials from enthusiastically exercising their duties. *Id.* The application of these policies to the instant matter suggests that the First Circuit's decision should be reversed.

First, as this Court and the First Circuit have recognized, it is not desirable to leave citizens without a remedy when constitutional rights are at issue. The First Circuit assumes such will be the result if police officers are insulated by a magistrate's decision in the circumstances of this case. 748 F.2d at 720. However, the First Circuit's conclusion is based on an overly narrow interpretation of "remedy." As this Court has recently recognized, the existence of remedies outside of 42 U.S.C. § 1983 may suffice even when such remedies "may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983." *Parratt v. Taylor*, 451 U.S. 527, 544 (1981). *Accord, Hudson v. Palmer*, 104 S. Ct. 3194 (1984).

In the present case, remedies outside of § 1983 are available which mitigate the deleterious effects of removing the § 1983 remedy. First, liability is still possible if the officer obtains a warrant based on knowing or reckless falsity. Second, the affidavit is subject to review by the magistrate, which as this Court has recognized, cannot be presumed ineffective. *United States v. Leon, supra.* Third, as the facts of the instant matter demonstrate, the criminal proceeding will be terminated if there is a subsequent determination of no probable cause. *See also United States v. Leon, supra* (exclusionary rule).

Amici recognize that the above-listed remedies do not constitute damage remedies equivalent to that provided by § 1983. However, when the availability of at least some remedies is considered with the strong policies favoring the granting of immunity, it is evident that immunity is desirable here.

The social costs of excessive litigation in the circumstances of the instant case are apparent. In particular, society must be concerned with the possibility of excessive deterrence. The First Circuit posits that its rule will not chill officers in the exercise of their duty but will promote "the rule of law." 748 F.2d at 719. However, one might question whether the rule of law will in fact be furthered if dedicated officers are subject to "the risk of monetary liability for a misstep while endeavoring to enforce the law." *United States v. Leon*, 104 S. Ct. at 3454, n. 28 (Stevens, J., dissenting).

In addition, concern must be expressed regarding the time and energy which litigation requires and which directly subtracts from a public official's ability to fulfill his duties. The Court has recognized the severity of this problem and modified the qualified immunity standard in response. *Harlow v. Fitzgerald, supra.* In *Harlow*, the Court particularly noted the "special costs" of the subjective test formerly applied in qualified immunity analysis:

> Judicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

457 U.S. at 817 (footnotes omitted).

The objective standard set forth in *Harlow* anticipates that the court will determine the reasonableness of an official's conduct (and thus his entitlement to qualified immunity) "by reference to clearly established law." 457 U.S. at 818. In other words, the analysis is to be a legal one. Unfortunately, the *Harlow* standard is almost impossible to apply in Fourth Amendment cases involving probable cause because such cases, by their very nature, must be decided on a case-by-case basis. The

facts of each situation are so individual that only rarely will existing case law clearly establish that particular conduct is prohibited. *Cf. Hudson v. Palmer*, 104 S. Ct. at 3206 (O'Connor, J., concurring) ("the Fourth Amendment 'reasonableness' determination is generally conducted on a case-by-case basis"). Because of the difficulties of making such a determination in warrant cases, there is a particular need for an objective rule of law to guide the courts and officers in their conduct.

The First Circuit states that its standard is an objective standard consistent with *Harlow*. And, indeed, the First Circuit does adopt the language of *Harlow* in its opinion. However, as a practical matter, the First Circuit's test of "constitutional negligence" perpetuates that which *Harlow* was designed to correct—the difficulty of a case-by-case analysis requiring considerable discovery and, ultimately, trial. For it is only by extensive analysis of each individual case that it will be possible to determine whether an officer "should have known" that the facts recited in his affidavit did not constitute probable cause.

Petitioner, on the other hand, offers a truly objective rule in this case by placing the responsibility for probable cause determinations squarely with the magistrate and removing the specter of liability for police officers in such circumstances unless the officer obtained the warrant with knowing or reckless falsity. In contrast with the First Circuit's holding, this rule is completely consistent with the policies underlying qualified immunity. It will provide officers with clear guidance for conduct and will allow them to direct their energies where they should be directed, to protecting the public. In addition, placing responsibility for probable cause determinations with the magistrate puts that decision in the hands of officials who are neutral, detached and trained in the law. The result

will be exactly what the First Circuit desires, "the exercise of police power *within* the law." 74[illegible] F.2d at 719 (emphasis in original).

CONCLUSION

The instant matter provides the Court with an opportunity to address the relationship between a police officer's duty to enforce the law and his potential exposure for civil liability for executing that duty. Recent cases regarding both law enforcement and civil liability have left unanswered the question raised in this case. However, the policies underlying those cases suggest that an officer who believes the facts in his affidavit to be true, and submits the affidavit to a neutral and detached magistrate, should not be liable for civil damages when it is subsequently determined that the warrant issued by the magistrate was not supported by probable cause. For these reasons, amici curiae join the Petitioners in urging the Court to grant the writ of certiorari and to reverse the decision of the Court of Appeals.

Dated: May 6, 1985.

Respectfully submitted,

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BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE PETITIONERS

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Ann M. Sheadel, Assistant Attorney General, State of Rhode Island, Counsel for Petitioners, and John S. Foley, Esq., Counsel for Respondents. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* sixty-one times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The *International Association of Chiefs of Police, Inc.* (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The *Legal Foundation of America* (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici well know the problems faced by police officers in their good faith attempts to conform their conduct to the requirements of the Fourth Amendment and to avoid possible civil liability for themselves and their agencies. The state of this intricate complex of rules compels these organizations to speak on behalf of law enforcement officers in this case.

ARGUMENT

I.

THE DECISION OF THE COURT BELOW IMPOSES A CONSTITUTIONALLY AND SOCIALLY UNWARRANTED BURDEN UPON POLICE OFFICERS TO BE THE ULTIMATE JUDGE OF THE SUFFICIENCY OF LEGAL PROCESSES THEY ARE SWORN TO SERVE; AND IT ALSO VIOLATES THIS COURT'S RULING IN HARLOW V. FITZGERALD

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the *International Association of Chiefs of Police,* various state associations of chiefs of police, and the *Legal Foundation of America.* Those briefs have presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, and without impinging upon basic constitutional protections. In the present brief, we will not undertake an extended analysis of the case law, but will confine our brief to the law enforcement impact of the issues raised by the parties.

Amici recognize that the practical impact of the ruling of the court below, *Briggs, v. Malley,* 748 F.2d 715 (1st Cir. 1984), is that even if a warrant is issued by a neutral and detached magistrate or judge who has made a probable cause determination, the officer can still be civilly liable for serving such process if it is later determined by a trial or appellate court that probable cause was lacking. It is our contention that this novel rule puts the police officer in an impossible position in our criminal justice system, one that was never contemplated by the architects of our constitutional and political system, and it violates the proper division of functions identified in *Baker v. McCollan,* 443 U.S. 137 (1979) for police officers and magistrates.

In *Gerstein v. Pugh,* 420 U.S. 103 (1975) this Court defined that division in a manner *amici* believe is both constitutionally accurate and reflective of the practical realities of our criminal justice system. It stated unequivocally, 420 U.S. at 112-13, that the role of the police is to investigate crime, and the role of the magistrate is to neutrally and in a detached manner determine the existence or non-existence of probable cause and to issue or refuse to issue warrants; moreover, this Court specifically recognized that such roles are *separate, distinct,* and *mutually* exclusive.

This division of functions was further emphasized in *U.S. v. Leon,* ____ U.S. ____, 104 S.Ct 3405 (1984), where the Court stated clearly that a police officer acting in good faith, i.e., free of the taint of falsity or misrepresentation, could rely upon the process issued by a neutral and detached magistrate and could serve such process, and its fruits would be admissible in spite of a subsequent judicial determination that the magistrate was mistaken in his or her probable cause finding.

This constitutionally required division of roles and responsibilities for police officers and magistrates is inextricably linked, as this Court has stated, to the Fourth Amendment's preference for warrants. As noted in *Johnson v. U.S.,* 333 U.S. 10 (1948) at 14, n.3:

> [T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. (quoting from *U.S. v. Lefkowitz,* 285 U.S. 452, 464 (1932)).

Amici recognize this linkage, and the preference sought to be protected thereby. When we as *amici* have argued for the

establishment of carefully defined exceptions to the warrant requirement, as in *Terry v. Ohio,* 392 U.S. 1 (1968) and *U.S. v. Ross,* 456 U.S. 798 (1982), we have done so *only* on the basis of compelling countervailing interests—such as protection of the life of police officers and the need to avoid the destruction of evidence due to the uniquely mobile character of its situs.

Here there is no compelling basis for the novel blurring of roles mandated by the court below and its unavoidable damage to the warrant preference. We respectfully submit to this Court, *based upon our collective experience* as law enforcement executives, administrators and public interest representatives, that the ruling of the court below may encourage some police officers to forgo obtaining warrants in some cases as they realize that they themselves have been enshrined as the final arbiter of probable cause prior to the initiation of formal criminal proceedings. This is a power that *amici* have no desire to see *even suggested or implied* as appropriate; yet it is the logical outcome of the ruling below and will be so perceived by some police officers acting in good faith. Moreover, law enforcement officers cannot reasonably be expected to perform the intricate balancing of Fourth Amendment interests and provision of civil remedies undertaken by the court below.

If the decision of the lower court is affirmed, law enforcement officers must then accurately assess the existence of probable cause *before* approaching the magistrate for a warrant, or else they face the possibility of personal civil liability under 42 U.S.C. § 1983. Mere issuance of the warrant by a neutral and detached magistrate will not insulate the officer from liability, as it would under traditional tort principles. See *Allison v. County of Ventura,* 68 Cal. App.3d 689, 137 Cal.Rptr. 542 (1977); *Nelson v. City of Las Vegas,* 99 Nev. 548, 665 P.2d 1141 (1983); *Bender v. City of Seattle,* 99 Wash.2d 582, 664 P.2d 492 (1983); *Restatement (Second) of Torts* § 41, Comment (a) 1977). Nor will the absence of falsity, misrepresentation or recklessness on the part of the officer.

Under this contorted reversal of roles imported by the decision below, where lies the incentive for the officer to utilize the magistrate at all? Of what benefit to the officer—criminally or civilly—will the magistrate be, at least in those cases arguably fitting one of the warrant exceptions? *Amici* submit that some officers, *acting in perfect good faith,* will be inclined on occasion to forego the time and effort to assemble affidavits and applications for warrants and present them to a magistrate. This will defeat the warrant preference so carefully put into place and nurtured by nearly two hundred years of Fourth Amendment jurisprudence and the intent of the Framers.

The position of the officer who proceeds to obtain a warrant may be even more precarious. When issuing the warrant, the magistrate is, in effect, issuing judicial process with an attendant order to the officer that such judicial process be served in accordance with law. *E.g.,* Cal. Penal Code (West, 1970 & 1983 Suppl.), § 836; Ill. Code of Criminal Procedure, Ill. Rev. Stat. ch. 38 (1981), § 107-2. The Illinois statute, for example, states that, "The warrant of arrest shall: . . . (6) Command that the person against whom the Complaint was made be arrested and brought before the court issuing the warrant or if he is absent or unable to act before the nearest or most accessible court in the same county . . ." What happens if the officer is suddenly seized with doubts about the sufficiency of the warrant?

What is he to do? Refuse to serve the warrant? Return it to the magistrate with the statement that the magistrate is wrong in his assessment of probable cause? Place the warrant in a desk drawer and conveniently forget it? Consult the prosecutor for a "second opinion," possibly a "third opinion" if the prosecutor initially reviewed and approved the application? The decision of the Court below presents the hapless officer with a bizarre set of choices, nonetheless real. Some of these choices are clearly inappropriate. Some may subject the officer to contempt of court for refusal to obey an order of the court. Some may

subject him to internal discipline for neglect of duty and failure to carry out a facially legal order. See Legal Aspects of Discipline by Police Administrators (Northwestern Traffic Institute, Evanston, Ill.) 3rd Ed., 1984. Not a single one of these choices—including referral back to the magistrate or the prosecutor—can *guarantee* the officer freedom from § 1983 liability under the rule of the court below. Once again, we ask where is the incentive to consult the magistrate at all in this type of "Catch-22" setting?

It is no answer to these questions to suggest that the ruling of the Court below might not apply to "grey areas" in which a police officer supposedly would not be expected to know that issuance of the warrant is in error. See, *e.g., Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Mitchell v. Forsyth,* ____ U.S. ____, 105 S.Ct. ____ (June 19, 1985). *Amici* have seen many "grey areas" in the law of Fourth Amendment jurisprudence become established proscriptions or established exceptions by virtue of subsequent caselaw developments. We do not propose that police officers be required to endlessly refine their appreciation of "grey areas" in the law as it relates to ultimate § 1983 liability. Indeed, the preference of this Court has been to establish "bright lines" for officers to follow in Fourth Amendment settings, see *New York v. Belton,* 453 U.S. 454 (1981) and *U.S. v. Ross, supra,* and we thoroughly subscribe to that process. Implementation of the ruling below runs counter to the ultimate impact of that process and makes the police officer the final arbiter at the pre-trial stage of what is a "grey area" for § 1983 liability. It gives the officer a power properly exercised only by the magistrate and the prosecutor. We do not believe this is a structurally appropriate role for the officer, in addition to running counter to the constitution and social determinations made by the legislature.

Harlow and related cases provide, in effect, a good faith defense to a police officer for conduct not clearly violative of a § 1983 plaintiff's constitutional rights. In the instant case the

conduct complained of was the submission to a magistrate by the police officer of his application for an arrest warrant. But submission of facts to an impartial and detached magistrate is conduct that *fully comports* with the Fourth Amendment and should *always* establish a good faith defense, in the absence of fraud, misrepresentation or other impropriety by the police officer. There is no better or more effective means devisable to protect individual rights than to submit facts to an impartial magistrate in a case not falling into one of the established exceptions to the warrant requirement. As this Court noted in *U.S. v. Leon,* ____ U.S. ____, 104 S.Ct. 3405, 3421 (1984), "Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest . . ." *Amici* support the adoption of a good faith exception to the exclusionary rule in warrantless arrest and search cases, but for those cases where a warrant is required, preferred or otherwise sought, the officer's conduct should be protected by the good faith defense in § 1983 actions if he has been free of falsity, misrepresentation and recklessness.

Amici submit that negligence as a basis for affixing § 1983 liability upon a police officer is inappropriate where the officer has followed the constitutionally prescribed procedure of relying upon a magistrate to make a probable cause determination. If this Court is concerned that such a holding may leave a § 1983 plaintiff without a cause of action for constitutional error in the probable cause determination because of the absolute immunity enjoyed by the magistrate under *Pierson v. Ray,* 386 U.S. 547 (1967)—which was apparently a concern of the court below—the remedy may be reexamination of the policies underlying judicial immunity, not in extension of personal liability to the police officer for conduct fully comporting with the Constitution.

CONCLUSION

Amici respectfully submit that the ruling of the court below is unwarranted under prior holdings of this Court, violates the constitutional delineation of the appropriate roles of police and magistrates, offends the Fourth Amendment warrant preference, and constitutes unwise judicial policy-making. It should be reversed by this Court with a clear statement to police officers that their good faith adherence to the warrant process will not be attended by the assessment of damages under 42 U.S.C. § 1983.

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No. 84-1586

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD MALLEY AND
THE STATE OF RHODE ISLAND,
Petitioners,

vs.

JAMES R. BRIGGS AND LOUISA BRIGGS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE STATE OF MINNESOTA, THE DISTRICT OF COLUMBIA, AND THE STATES OF ALABAMA, ARIZONA, CALIFORNIA, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST

The Amici States through their attorneys general, and the District of Columbia through its corporation counsel, respectfully offer this brief in support of the petitioners. This case raises issues of considerable public importance, the resolution of which will directly impact the amici.

First, amici have a significant responsibility to ensure the health, safety and welfare of their citizens through law enforcement activities. This responsibility is carried out through both the direct administration of law enforcement agencies and by providing guidance for the law enforcement agencies of other governmental units. Second, amici have, in varying degrees, responsibility for defending public officials subject to damage actions pursuant to 42 U.S.C. § 1983. Thus, amici are concerned with protecting public officials from monetary liability to the maximum extent provided by law.

Because of their interest in providing effective law enforcement and in protecting public officials from unwarranted liability, amici submit this brief in support of the petitioners.

SUMMARY OF ARGUMENT

The Court of Appeals' decision is inconsistent with this Court's principles regarding the functions of police officers and magistrates and with the policies underlying qualified immunity.

This Court has indicated that the responsibility for determining whether probable cause exists, and a warrant should therefore issue, rests with the neutral and detached magistrate issuing the warrant, not with the police officer seeking the warrant. *E.g., United States v. Leon,* 104 S. Ct. 3405 (1984). The Court of Appeals, however, has placed the burden of civil liability for an improper determination of probable cause on the police officer. The principles underlying this Court's decision in *Leon* and its antecedents suggest that the Court of Appeals' allocation of responsibility is erroneous.

Similarly, the policies underlying qualified immunity suggest that a police officer should be insulated from liability in the circumstances of this case. The social costs of excessive litigation prompted this Court to establish an objective standard for determining qualified immunity. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The rule proposed by Rhode Island in the instant matter is a logical application of *Harlow* to the peculiar difficulties raised by fourth amendment analysis and application.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S PRINCIPLES REGARDING THE FUNCTIONS OF POLICE OFFICERS AND MAGISTRATES.

This case presents the important and unresolved question of whether a police officer, who believes the facts in his affidavit to be true, and who submits the affidavit to a neutral and detached magistrate, can be held liable for damages under 42 U.S.C. § 1983 when it is subsequently determined that the facts recited in the affidavit did not constitute probable cause. The Court of Appeals for the First Circuit has approved liability in such circumstances. This ruling is inconsistent with this Court's principles regarding the functions of police officers and magistrates.

This Court has consistently recognized that police officers and magistrates perform different, though complementary, functions within the criminal justice system. As the Court stated in *Gerstein v. Pugh*, 420 U.S. 103 (1975):

> [T]he 'very heart of the Fourth Amendment directive' [is] a requirement that . . . a governmental search and seizure [or arrest] should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation.'

Id. at 113 n.12 (citation omitted). In other words, it is the function of the officer to conduct the investigation and present the information gathered to a magistrate, and it is the function of the magistrate to review that evidence and determine "in the first instance" whether probable cause exists.

United States v. Ross, 456 U.S. 798, 828 (1982) (Marshall, J., dissenting). *See also Illinois v. Gates*, 462 U.S. 213, 275 (1983) (Brennan, J., dissenting) ("a neutral and detached magistrate, and not the police should determine whether there is probable cause to support the issuance of a warrant").

This division of functions is of both practical and constitutional significance—it encourages vigorous and effective law enforcement while supporting the fourth amendment's preference for the warrant process. It accomplishes this by clarifying lines of responsibility and placing the probable cause determination in the most appropriate hands, those of the magistrate. Magistrates and judicial officers are independent, objective and trained in the law. In addition, a fundamental part of their duties is to keep abreast of the law and to engage in finely tuned legal analysis when necessary. The "police officer on the beat" cannot be expected to meet this standard. *United States v. Ross*, 456 U.S. at 827 (Marshall, J., dissenting). Rather, the probable cause determination should be made by an "independent arbiter", the magistrate. *Illinois v. Gates*, 462 U.S. at 275 (Brennan, J., dissenting).

The Court recently and firmly reiterated these principles in *United States v. Leon*, 104 S. Ct. 3405 (1984). There the Court again indicated that the responsibility for determining whether probable cause exists, and a warrant should therefore issue, rests with the neutral and detached magistrate issuing the warrant, not with the police officer seeking the warrant. 104 S. Ct. at 3420-21. In placing this responsibility with the magistrate, the Court recognized that "reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause" and the Court thus accorded " 'great deference' to a magistrate's determination." 104 S. Ct. at 3417. The Court reaffirmed the differing roles of police officers and magistrates, the former being

"engaged in the often competitive enterprise of ferreting out crime' and the latter providing "the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches." 104 S. Ct. at 3416 (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1971)).

Despite the Court's consistent position that the responsibility for probable cause determinations rests with the magistrate or judge issuing the warrant, the First Circuit has placed the burden of civil liability for an improper determination of probable cause on the police officer requesting the warrant whenever the officer "should have known" that probable cause is lacking. *Briggs v. Malley*, 748 F.2d 715 (1st Cir. 1984). In so holding, the First Circuit relies largely on its perception of the dangers of making a magistrate "the sole protector of the fourth amendment," that is, the danger of encouraging "sloppy police work" and the danger that the magistrate will be ineffective in his scrutiny. 748 F.2d at 720.

However, as *Leon* suggests, it is questionable whether either of these anticipated dangers really exists. First, the proposition that placing responsibility on magistrates encourages sloppy police work assumes what the First Circuit makes explicit in its second conclusion, that magistrates are ineffective. This Court indicated that such an assumption cannot be made because "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment . . . ." 104 S. Ct. at 3418. Rather, the Court has recognized that "limiting the application of the exclusionary sanction may well increase the care with which magistrates scrutinize warrant applications." 104 S. Ct. at 3419, n.18. Moreover, magistrates are subject to district court supervision, which this Court has found to be an effective incentive for reasoned decision-making by magistrates. *Id.*

Second, the First Circuit apparently assumes that a magistrate's review must either completely insulate an officer or cannot insulate him at all. If such insulation were complete under all circumstances, amici might agree that there would be no deterrent to police misconduct and "sloppy police work" would result. However, the magistrate cannot insulate the officer where the officer either knew that the information in the affidavit was false or acted in reckless disregard of the truth. 104 S. Ct. at 3421-22 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). Thus, an ample deterrent remains to guard against officers' obtaining warrants in completely inappropriate situations.

The First Circuit's decision, when read with *Leon* and its antecedents, poses a difficult dilemma for law enforcement officers. For the purposes of a criminal proceeding, officers are encouraged to rely on a neutral and detached magistrate or judge for a determination of probable cause. However, if an officer engages in such reliance, he runs the risk of incurring civil liability under *Briggs v. Malley*, which places responsibility for determining probable cause back on the police. This result is inconsistent with the recognized division of functions between police officers and magistrates. A police officer, whose duty is to present evidence to the magistrate before proceeding with a search or arrest, should not be penalized for an after-the-fact determination that the magistrate erroneously found probable cause existed. *United States v. Leon*, 104 S. Ct. at 3420. If the officer fails in this duty by presenting evidence which is false or by recklessly disregarding the truth, liability may be appropriate. However, it is the duty of the magistrate, not the police officer, to determine whether the quantum of evidence is sufficient to establish probable cause. The First Circuit's decision transfers this duty to the police officer, and the decision should therefore be reversed.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE POLICIES UNDERLYING QUALIFIED IMMUNITY.

As this Court recognized in *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982): "The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." On the one hand, immunity may be undesirable because "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." 457 U.S. at 814. On the other hand, immunity may be desirable in order to mitigate the social costs of unlimited liability. Such costs include the expenses of litigation, the "diversion of official energy from pressing public issues," discouraging competent citizens from accepting public office, and the danger of excessively deterring officials from enthusiastically exercising their duties. *Id.* The application of these policies to the instant matter suggests that the First Circuit's decision should be reversed.

As this Court and the First Circuit have recognized, it is not desirable to leave citizens without a remedy when constitutional rights are at issue. The First Circuit assumes such will be the result if police officers are insulated by a magistrate's decision in the circumstances of this case. 748 F.2d at 720. However, the First Circuit's conclusion is based on an overly narrow interpretation of "remedy." As this Court has recently recognized, the existence of remedies outside of 42 U.S.C. § 1983 may suffice even when such remedies "may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983." *Parratt v. Taylor*, 451 U.S. 527, 544 (1981). *Accord Hudson v. Palmer*, 104 S. Ct. 3194 (1984).

In the present case, remedies are available which mitigate the deleterious effects of limiting the § 1983 remedy. First, liability is still possible under § 1983 if the officer obtains a warrant based on knowing or reckless falsity. Second, the affidavit is subject to review by the magistrate, which as this Court has recognized, cannot be presumed ineffective. *United States v. Leon*, 104 S. Ct. 3418-19. Third, as the facts of the instant matter demonstrate, the criminal proceeding will be terminated if there is a subsequent determination of no probable cause. *See also United States v. Leon, supra* (exclusionary rule). Finally, state tort remedies may be available in appropriate circumstances.[1]

Amici recognize that not all of the above-listed remedies constitute damage remedies equivalent to that provided by § 1983. However, when the availability of at least some remedies is considered with the strong policies favoring the granting of immunity, it is evident that immunity is desirable here.

The social costs of excessive litigation in the circumstances of the instant case are apparent. In particular, society must be concerned with the possibility of excessive deterrence. The First Circuit posits that its rule will not chill officers in the exercise of their duty but will promote "the rule of law." 748 F.2d at 719. However, as the Court has recognized,

> '[o]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.' . . . Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

United States v. Leon, 104 S. Ct. at 3420 (citation and footnote omitted). Indeed, the fear of personal liability is likely

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[1] Such remedies may include actions for false imprisonment, malicious prosecution, invasion of privacy, and intentional infliction of emotional distress.

to create excessive deterrence by making police officers reluctant to apply for warrants absent an airtight case, and by encouraging officers to distort their presentation of evidence in order to protect themselves. *Cf. Briscoe v. LaHue*, 460 U.S. 325, 333 (1983) (absolute immunity for police witnesses). Contrary to the First Circuit's conclusion, the rule of law will not be furthered if dedicated officers are subject to "the risk of monetary liability for a misstep while endeavoring to enforce the law." *United States v. Leon*, 104 S. Ct. at 3454, n.28 (Stevens, J., dissenting).

In addition, concern must be expressed regarding the time and energy which litigation requires and which directly subtracts from a public official's ability to fulfill his duties.

> [E]ven the processing of a complaint that is dismissed before trial consumes a considerable amount of time and resources.
>
> . . . To some degree, the individual's burden might be alleviated by the government's provision of counsel, but a case that goes to trial always imposes significant emotional and other costs on every party litigant.

Briscoe v. LaHue, 460 U.S. at 343-4 (footnote omitted). The Court has recognized the severity of this problem and modified the qualified immunity standard in response. *Harlow v. Fitzgerald, supra.* In *Harlow*, the Court particularly noted the "special costs" of the subjective test formerly applied in qualified immunity analysis:

> Judicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

457 U.S. at 817 (footnotes omitted).

The objective standard set forth in *Harlow* anticipates that the court will determine the reasonableness of an official's conduct (and thus his entitlement to qualified immunity) "by reference to clearly established law." 457 U.S. at 818. In other words, the analysis is to be a legal one. Unfortunately, the *Harlow* standard is almost impossible to apply in Fourth Amendment cases involving probable cause because such cases, by their very nature, must be decided on a case-by-case basis. The facts of each situation are so individual that only rarely will existing case law clearly establish that particular conduct is prohibited. As the Court noted in *Illinois v. Gates*:

> [P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.

462 U.S. at 232. *See also United States v. Leon*, 104 S. Ct. at 3417 ("reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause"). *Cf. Hudson v. Palmer*, 104 S. Ct. at 3206 (O'Connor, J., concurring) ("the Fourth Amendment 'reasonableness' determination is generally conducted on a case-by-case basis"). Because of the difficulties of making such a determination in warrant cases, there is a particular need for an objective rule of law to guide the courts and officers in their conduct. *See United States v. Ross*, 456 U.S. at 825 (Blackmun, J., concurring).

The First Circuit states that its standard is an objective standard consistent with *Harlow*. And, indeed, the First Circuit does adopt the language of *Harlow* in its opinion. However, as a practical matter, the First Circuit's test of "constitutional negligence" perpetuates that which *Harlow* was designed to correct—the difficulty of a case-by-case analysis

requiring considerable discovery and, ultimately, trial. For it is only by extensive analysis of each individual case that it will be possible to determine whether an officer "should have known" that the facts recited in his affidavit did not constitute probable cause.

Petitioner, on the other hand, offers a truly objective rule in this case by placing the responsibility for probable cause determinations squarely with the magistrate and removing the specter of liability for police officers in such circumstances unless the officer obtained the warrant with knowing or reckless falsity. This rule is a logical extension of recent developments in Fourth Amendment analysis where the Court has stated that:

> '[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness,' *Illinois v. Gates*, 462 U.S. at ——, 103 S. Ct. at 2347 (White, J., concurring in the judgment), for 'a warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith conducting the search.' *United States v. Ross*, 456 U.S. 798, 823, n.32, 102 S. Ct. 2157, 2172, n.32, 72 L.Ed.2d 572 (1982).

United States v. Leon, 104 S. Ct. at 3421. In contrast with the First Circuit's holding, the rule is completely consistent with the policies underlying qualified immunity. It will provide officers with clear guidance for conduct and will allow them to direct their energies where they should be directed, to protecting the public. In addition, placing responsibility for probable cause determinations with the magistrate puts that decision in the hands of officials who are neutral, detached and trained in the law. See discussion *supra* at p. 4. The result will be exactly what the First Circuit desires, "the exercise of police power *within* the law." 748 F.2d at 719 (emphasis in original).

CONCLUSION

The instant matter provides the Court with an opportunity to address the relationship between a police officer's duty to enforce the law and his potential exposure for civil liability for executing that duty. Recent cases regarding both law enforcement and civil liability have left unanswered the question raised in this case. However, the policies underlying those cases suggest that an officer who believes the facts in his affidavit to be true, and submits the affidavit to a neutral and detached magistrate, should not be liable for civil damages when it is subsequently determined that the warrant issued by the magistrate was not supported by probable cause. For these reasons, amici curiae join the Petitioners in urging the Court to reverse the decision of the Court of Appeals.

Dated: July 26, 1985.

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No. 84-1586 (ID)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD MALLEY and THE STATE OF RHODE ISLAND,

Petitioners,

—v.—

JAMES R. BRIGGS and LOUISA BRIGGS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE RHODE ISLAND CIVIL LIBERTIES UNION AS *AMICI CURIAE*

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE RHODE ISLAND CIVIL LIBERTIES UNION AS AMICI CURIAE

INTEREST OF AMICI CURIAE

This brief is respectfully submitted on behalf of the American Civil Liberties Union and the Rhode Island Civil Liberties Union. This brief is filed with the consent of the parties; letters consenting to the filing of this brief have been lodged with the Clerk of this Court.

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting and preserving the liberties safeguarded by the Constitution and the Bill of Rights. The Rhode Island Civil Liberties Union is the Rhode Island affiliate of the ACLU. The prohibition against unreasonable searches and seizures contained in the Fourth Amendment is critically important among those safeguards. The ACLU and its affiliates have participated in many of the leading cases in which this

Court has given shape and content to the Fourth Amendment. In Mapp v. Ohio, 367 U.S. 643 (1961), the ACLU filed the only brief before the Court urging application of the exclusionary rule to the States, and was permitted by the Court to raise the point at oral argument. 367 U.S. at 646 n.3. The ACLU appeared as amicus curiae in United States v. Leon, ___ U.S. ___, 104 S. Ct. 3405 (1984), and appears again here because of its belief that the recognition of an absolute immunity for police officers who procure patently groundless arrest warrants would eliminate a significant deterrent to police conduct which violates the Fourth Amendment right of every citizen to be secure against unreasonable searches and seizures.

SUMMARY OF ARGUMENT

This case presents a question which is critical to the continued effectiveness

of 42 U.S.C. § 1983 ("Section 1983") as a vehicle through which citizens can seek redress for violations of their constitutional rights. That question is whether police officers should be liable when they procure arrest warrants on the basis of applications that clearly fail to provide probable cause. Amici submit that police officers submitting such patently groundless warrant applications are protected neither by qualified nor absolute immunity.

A. Petitioners' contention that a police officer submitting a patently groundless warrant application to a magistrate is protected by qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982), is without merit. In Harlow, the Court held that qualified immunity is not available as a defense where the conduct challenged is "objectively unreasonable" because it "violated clearly established

. . . constitutional rights of which a reasonable person would have known." 457 U.S. at 818. Since a patently groundless warrant has long been recognized to violate the Fourth Amendment, a police officer procuring such a warrant can claim no qualified immunity under Harlow.

This is precisely the teaching of the Court's decision in United States v. Leon, _____ U.S. _____, 104 S. Ct. 3405 (1984). In Leon, the Court, citing Harlow, held that a police officer's reliance on a magistrate's probable cause determination must be "objectively reasonable" in order to qualify for the "good faith" exception to the exclusionary rule. ____ U.S. at ____, 104 S. Ct. at 3421. In so holding, the Court stated that where a reasonably well-trained police officer would have known that the warrant he procured was not supported by probable cause, the officer's

conduct offends clearly established constitutional rights and is not "objectively reasonable." ____ U.S. at ____, 104 S. Ct. at 3423.

B. Petitioners have also failed to demonstrate that police officers, who have long possessed only a qualified immunity from liability, should be accorded absolute immunity when they procure patently groundless warrants. Absolute immunity in these circumstances would not promote any compelling public interest, and indeed, would frustrate the purpose of Congress in creating a private remedy for, and deterrent of, unconstitutional behavior.

Police officers are called upon daily to take actions which may threaten the right of individual citizens to be free from unreasonable searches and seizures without probable cause. The need for police officers to take heed of the probable cause

requirement is therefore particularly acute. A grant of absolute immunity will encourage police officers to proceed to magistrates with warrant applications that are patently groundless. Innocent persons victimized by such conduct will have no remedy, and guilty persons may escape prosecution entirely because the evidence secured will be suppressed under Leon.

These results will be avoided by rejection of absolute immunity in this case. There is no reason why police officers should be encouraged to depart from the flexible standard of probable cause when they submit applications for arrest warrants. Probable cause is a common-sense concept which already provides ample room for reasonable police errors. This hallowed constitutional precept will be deprived of its vitality if police officers are free to disregard it in the future.

ARGUMENT

A POLICE OFFICER WHO PROCURES A WARRANT IN AN OBJECTIVELY UNREASONABLE MANNER IS LIABLE FOR DAMAGES UNDER 42 U.S.C. § 1983

The question presented in the instant case is whether a police officer is subject to liability under 42 U.S.C. § 1983 ("Section 1983") for submitting a warrant application that clearly failed to provide probable cause and would result in the suppression of evidence under United States v. Leon, ____ U.S. ____, 104 S. Ct. 3405 (1984). Because there is no basis to recognize an immunity for such objectively unreasonable behavior, and because there are important reasons why the procurement of such patently groundless warrants should be subject to suit, this Court should hold that a police officer has no immunity defense for such conduct.

A. In the Absence of Absolute Immunity, A Police Officer Is Liable for Damages Under Section 1983 for Procuring a Patently Groundless Warrant

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court redefined the standard of qualified immunity available to many public officials.[1] The Court eliminated the need for a subjective inquiry into the mind of the official, and held that questions of qualified immunity would henceforth be determined solely on the basis of the "objective reasonableness of an official's conduct, as measured by reference to clearly established law."

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[1] Harlow was a suit brought directly under the Constitution against federal officials pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), rather than a suit under Section 1983 against state officials. This Court has held that it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 438 U.S. 478, 504 (1978); see also Davis v. Scherer, ____ U.S. ____, 104 S. Ct. 3012, 3020 n.12 (1984).

457 U.S. at 818. Under Harlow, the decisive issue with respect to qualified immunity is whether the conduct challenged "violated clearly established . . . constitutional rights of which a reasonable person would have known." Id. See Mitchell v. Forsyth, _____ U.S. _____, 105 S. Ct. 2806 (1985); Davis v. Scherer, ____ U.S. ____, 104 S. Ct. 3012 (1984).

In this case, Petitioner Malley prepared and obtained a patently groundless arrest warrant. In other words, any police officer should have known that, in these circumstances, the requested arrest warrant was clearly lacking in probable cause. For Petitioner to disregard that manifest deficiency and seek the arrest warrant nonetheless, violates "clearly established" constitutional law. Therefore, Petitioner

Malley is not immune from suit.[2]

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[2] Application of the constitutional standard for determining immunity in this warrant case is different than application of the standard in a warrantless arrest case.

This Court has often emphasized that it is constitutionally preferable for the police to obtain a warrant, particularly if there is any doubt about the sufficiency of probable cause. See Leon, supra. Therefore, when a police officer obtains a warrant, the officer is acting consistently with established law -- and is consequently protected by a qualified immunity -- except in those very limited instances, such as the instant case, in which the warrant application was patently without probable cause, in which case even seeking the warrant offends clearly established law. Cf. Leon, supra.

Where no warrant is sought, however, the law is clearly established that an officer may not make an arrest except upon probable cause. E.g., Dunaway v. New York, 442 U.S. 200 (1979). In such warrantless cases, therefore, the officer will be denied immunity whenever probable cause is lacking, even if the officer later claims that the sufficiency of probable cause was uncertain at the time. In such cases of uncertainty, the officer should obtain a warrant. Thus, if an officer elects to effect an arrest without a warrant in circumstances where probable cause was less than clear, and it is later determined that there was insufficient basis for the arrest, then the officer should not be granted immunity for that constitutional misjudgment.

[Footnote continued on following page]

Petitioners contend that a police officer's resort to a warrant is per se objectively reasonable under Harlow. (Petitioners' Brief, at 15, 35-38.) This argument was rejected in Leon, where the Court, citing Harlow, expressly ruled that not all conduct undertaken pursuant to a warrant is objectively reasonable. ____ U.S. at ____, 104 S. Ct. at 3421-22. Indeed, if the warrant in this case had produced incriminating evidence, such evidence would be excludable even after Leon precisely because Petitioner Malley "could not have harbored an objectively reasonable belief in the existence of probable cause." ____ U.S. at ____, 104 S. Ct. at 3423.

[Footnote 2 continued from preceding page]
This standard -- which would have the effect of immunizing an officer who obtains a warrant when probable cause is unclear, but would not immunize an officer acting without a warrant in the same circumstances -- encourages reliance on warrants, which of course was an underlying rationale of the decision in Leon, as well.

In Leon, this Court announced a "good faith" exception to the exclusionary rule set forth in Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961). The "good faith" exception permits the prosecution to introduce evidence which was obtained pursuant to a warrant issued without probable cause where the police officer seeking the warrant acted in "objectively reasonable" reliance on the magistrate's erroneous probable cause determination. ____ U.S. at ____, 104 S. Ct. at 3421. The Court held, however, that not all police conduct undertaken pursuant to a warrant satisfies the "objectively reasonable" standard. ___ U.S. at ___, 104 S. Ct. at 3421-22. Of particular significance here, the Court emphasized that there are instances in which a warrant application is "'so lacking in indicia of probable cause as to render

official belief in its existence entirely unreasonable.'" ____ U.S. at ____, 104 S. Ct. at 3422 (quoting Brown v. Illinois, 422 U.S. 590, 611 (1975)). See Nathanson v. United States, 290 U.S. 41 (1933) (suppressing evidence obtained by search warrant clearly lacking probable cause). In such instances, where the police officer has not "manifest[ed] objective good faith in relying on [the] warrant," ____ U.S. at ____, 104 S. Ct. at 3422, the "good faith" exception does not apply and any evidence obtained pursuant to the warrant may not be introduced in the prosecution's case-in-chief. ___ U.S. at ___, ___, 104 S. Ct. at 3421 n.23, 3423. Similarly, in such instances, the officer is not entitled to qualified immunity because securing such a patently groundless warrant violated "clearly established" constitutional rights.

The qualified immunity afforded by Harlow, as explicated in Leon, provides ample protection for police officers applying for warrants. A police officer will be protected by qualified immunity unless he submits a warrant application that clearly fails to provide probable cause. No additional protection is necessary. As we demonstrate below, patently groundless applications should not be granted the defense of absolute immunity by this Court.

B. Police Officers Do Not Have Absolute Immunity in Connection with Arrests of Private Citizens

In Butz v. Economou, 438 U.S. 478, 506 (1978), the Court stated that "[those] who seek absolute exempton from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires [it]." Petitioners cannot possibly meet this burden in this case.

1. Police Officers Have Always Enjoyed Only Qualified Immunity from Liability

This Court has never accorded absolute immunity to police officers for their conduct in criminal investigations. To the contrary, the Court held in Pierson v. Ray, 386 U.S. 547, 557 (1967), that police officers are entitled only to qualified immunity. In Pierson, a group of white and black clergymen attempting to use segregated facilities at an interstate bus terminal in Jackson, Mississippi were arrested and convicted under an ordinance later declared unconstitutional. The clergymen sued both the judge who decided their cases and the police officers who arrested them. The Court held that the judge was absolutely immune from liability. However, the Court found that the arresting officers were entitled only to qualified immunity. In

reaching this decision, the Court recognized that "[t]he common law has never granted police officers an absolute and unqualified immunity." 386 U.S. at 555; see Foley v. Connelie, 435 U.S. 291, 299 (1978); Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

The lower courts are in agreement that police officers do not have absolute immunity for their conduct in criminal investigations. As the Eighth Circuit recently stated in Ray v. Pickett, 734 F.2d 370, 374 (8th Cir. 1984): "Police officers have never been granted an absolute immunity in making the decision to arrest."

2. Qualified Immunity Will Deter Police Officers from Procuring Patently Groundless Warrants

This Court has denied absolute immunity to most federal and state officials, including the United States Attorney General, Mitchell v. Forsyth, ____ U.S. ____, 105

S. Ct. 2806 (1985); Presidential aides, Harlow v. Fitzgerald, 457 U.S. 800 (1982); members of the President's Cabinet and senior officials in federal agencies, Butz v. Economou, 438 U.S. 478 (1978); and a state governor and senior state executive officials, Scheuer v. Rhodes, 416 U.S. 232 (1974). The Court has recognized that absolute immunity should be avoided because it "provide[s] no redress to the injured citizen, nor [does] it in any degree deter . . . officials from committing constitutional wrongs." Butz, 438 U.S. at 505.[3]

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[3] Persons arrested pursuant to a patently groundless warrant will have no remedy whatsoever if police officers are granted absolute immunity for procuring such warrants. The state cannot be sued due to the Eleventh Amendment. See Ex Parte Young, 209 U.S. 123 (1908). The magistrate issuing the warrant is absolutely immune from civil suit. Pierson, 386 U.S. at 553-55. In addition, the municipality would not be liable unless petitioner Malley's actions were undertaken pursuant to official municipal policy or custom. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-91 (1978).

Recently, in Mitchell, ____ U.S. at ____, 105 S. Ct. at 2814, where the United States Attorney General was accorded only qualified immunity, the Court recognized that qualified immunity serves to deter unconstitutional acts:

> [The Attorney General] may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the Harlow standard: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights he should be made to hesitate . . . ." [Harlow, 457 U.S.] at 819. This is as true in matters of national security as in other field of governmental action. We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law. (Emphasis in original.)

Similarly, the public interest will not be jeopardized, but rather will be promoted,

if police officers are given incentives to avoid submitting patently groundless warrant applications.

Petitioners argue that police officers should be granted absolute immunity because they cannot be expected to understand the probable cause requirement of the Fourth Amendment. (Petitioners' Brief, at 32-34.) This argument is unfounded. Police officers are required "to have a reasonable knowledge of what the law prohibits." United States v. Leon, ____ U.S. at ____, 104 S. Ct. at 3420 n.20. Police officers confront the issue of probable cause daily, not only in determining whether they have adequate information to seek a warrant from a magistrate, but also in deciding whether activity they observe provides the basis for a warrantless arrest or search. See United States v. Watson, 423 U.S. 411 (1976). Police officers are well acquainted with the constitutional standard.

The probable cause standard is a practical and flexible concept requiring only reasonable conduct by police officers. This standard is well within the competence of police officers: "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical, they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949). The probable cause standard provides ample room for reasonable errors by police officers. As this Court stated in Brinegar, 338 U.S. at 176:

> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. (Emphasis added.)

In light of the flexibility afforded by the probable cause requirement, there is no need or justification for a rule of absolute immunity that would excuse police officers from paying attention to the requirements of the Fourth Amendment. A police officer's errors will not lead to liability if the mistakes are reasonable. The submission of a patently groundless warrant application, however, violates clearly established constitutional rights and should not be protected.

The Court has recognized that where the officials involved have the potential to engage in frequent and widespread violations of the rights of the public, absolute immunity poses particular dangers that must be avoided. See Butz v. Economou, 438 U.S. at 505. A significant deterrent to unconstitutional conduct will be removed

if police officers are informed by this Court that they can violate Fourth Amendment rights with impunity by the simple expedient of submitting a patently groundless warrant application to a magistrate.

3. Qualified Immunity Is Consistent With the Interests of Effective Law Enforcement

A rule of qualified immunity, under which police officers will be held liable when they engage in objectively unreasonable conduct, will also contribute to effective law enforcement. A police officer who faces the prospect of liability for submitting a patently groundless application is likely to investigate more thoroughly before he proceeds to a magistrate. Such investigation will either strengthen the prosecution's case by leading the police officer to additional facts sufficient to establish probable cause, or will indicate

that probable cause is not present. Both of these outcomes are consistent with effective law enforcement.

The incentive to investigate further will have another salutary effect. Under Leon, the exclusionary rule continues to require the suppression of evidence whenever a police officer submits a patently groundless warrant application. ____ U.S. at ____, 104 S. Ct. at 3421-22. To the extent that the denial of absolute immunity will discourage such applications, suppression will occur less often in the future and law enforcement will be enhanced. A grant of absolute immunity is likely to have precisely the opposite effect. Freedom from the possibility of liability will encourage police officers to submit "bare bones" affidavits. See Leon, ___ U.S. at ___, 104 S. Ct. at 3421 n.24. As a result, suppression under Leon will

occur more frequently and the interests of society in vigorous law enforcement will be impaired.

4. Since a Warrant Is Often Constitutionally Required, the Use of a Warrant Should Not Result in Absolute Immunity

Petitioners contend that the Court's preference for warrants should lead it to grant absolute immunity to police officers whenever they resort to warrants. (Petitioners' Brief, at 28-38.) This contention is without merit. While this Court has expressed its preference for warrants, e.g., United States v. Ventresca, 380 U.S. 102, 105-07 (1965), arrests in the home are required to be pursuant to warrant absent exigent circumstances. E.g., Payton v. New York, 445 U.S. 573 (1980). Respondents' arrest upon a warrant in this case, therefore, was not a matter of the police officer's choice, but rather a legal necessity.

Moreover, Petitioners' claim that the Court's preference for warrants should excuse objectively unreasonable reliance on patently groundless warrants was rejected by the Court in Leon. In Leon, the Court reiterated its preference for warrants, ____ U.S. at ____, 104 S. Ct. at 3416-17, but nonetheless refused to create a "good faith" exception to the exclusionary rule that would apply in all cases in which a police officer has obtained a warrant. Instead, the Court held that the officer's reliance on the magistrate's probable cause determination "must be objectively reasonable." ___ U.S. ___, 104 S. Ct. at 3421. Similarly, this Court should not exalt the preference for warrants over the requirement of probable cause in cases involving Section 1983.[4]

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[4] Although petitioners have now abandoned the "causation" argument that was advanced below and in their Petition for Certiorari, Leon also demonstrates that the magistrate's approval of the warrant application does

[Footnote continued on following page]

5. Police Officers Are Not Entitled to Absolute Immunity by Analogy to Prosecutors or Civilian Complainants at Common Law

Petitioners contend that a police officer obtaining an arrest warrant is entitled to absolute immunity by analogy to the absolute immunity prosecutors possess when initiating prosecutions and presenting the state's case. Imbler v. Pachtman, 424 U.S. 409, 431 (1976). (Petitioners' Brief, at 21-22.) Petitioner Malley,

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[Footnote 4 continued from preceding page] not break the chain of causation between the police officer's submission of the application and the resulting unconstitutional search or seizure. This result is consistent with common-law tort principles. As this Court held in Atchison &c. Railway Co. v. Calhoun, 213 U.S. 1, 7 (1909), if an individual's "misconduct . . . is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him . . . one is held responsible for all the consequences of his acts which . . . ought to have been foreseen by a reasonably prudent man."

however, was not acting as a prosecutor initiating a prosecution. Under Rhode Island law, police officers have no power to bring prosecutions for felony offenses. A grand jury indictment or a prosecutor's information is necessary to initiate a prosecution. R.I. Gen. Laws § 12-12-1.2.

Petitioner Malley was engaged in the routine police tasks involved in a criminal investigation. In Imbler, the Court left open the question of whether a prosecutor is entitled to absolute immunity for investigative activities or whether such activities would necessitate only "a good-faith defense comparable to the policeman's." 424 U.S. at 430 (citing Pierson, 386 U.S. at 557) (footnote omitted). More recently, in Harlow, 457 U.S. at 811 n.16, the Court noted that the lower courts have generally ruled that prosecutors do not enjoy absolute immunity for acts taken

in their investigative capacities. These courts have recognized that investigative actions do not involve decisions as sensitive as those involved in the initiation and presentation of prosecutions.

This Court has granted absolute immunity to prosecutors and other participants in court proceedings, including judges, Bradley v. Fisher, 13 Wall. 335 (1872); Pierson, supra, and witnesses, including police officers who serve as witnesses, Briscoe v. LaHue, 460 U.S. 325 (1983), largely because "[i]t is precisely the function of a judicial proceeding to determine where the truth lies . . . those involved in judicial proceedings should be given every encouragement to make a full disclosure of all pertinent information within their knowledge." Briscoe, 460 U.S. at 335 (quoting Imbler, 424 U.S. at

439 (White, J., concurring)).[5] This rationale cannot be stretched to encompass a police officer who submits a patently groundless application to a magistrate. Police officers, whose investigative activities take place outside of the courtroom, already have every incentive to disclose all the information in their possession in support of their warrant applications. Absolute immunity is not needed in order to insure full disclosure by police officers.

Petitioners' alternative analogy, that a police officer seeking a warrant is similar to a citizen making a complaint, is inapt because police officers, unlike

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[5] In addition, this Court has granted absolute immunity to the President of the United States, Nixon v. Fitzgerald, 457 U.S. 731 (1982), and legislators, Tenney v. Brandhove, 341 U.S. 367 (1951). These officials were able to demonstrate that they had complex discretionary responsibilities "so sensitive as to require a total shield from liability." Harlow, 457 U.S. at 813.

private citizens, are public officials who are required to abide by the requirements of the Constitution. These constitutional duties cannot be ignored by treating police officers as if they were private citizens who have no such duties.

Moreover, the comparison, even if apt, would support only a claim of qualified immunity. An arrest or prosecution procured by a civilian was not absolutely protected at common law. Civilian complainants were subject to liability for malicious prosecution if they acted in bad faith. E.g., Nesmith v. Alford, 318 F.2d 110, 121, 123-24 (5th Cir. 1963), cert. denied, 375 U.S. 975 (1964); see also Wolf v. Colorado, 338 U.S. 25, 30 n.1 (1949). In Harlow, this Court ruled that a subjective inquiry into an officials' state of mind is inappropriate under Section 1983. Accordingly, "bad faith" is established

for Section 1983 purposes whenever a public official, like Petitioner Malley, engages in "objectively unreasonable" conduct.

CONCLUSION

The procurement of a patently groundless warrant is not protected by either qualified or absolute immunity. Such flagrantly unconstitutional behavior leads to the suppression of evidence under Lecn and should also lead to the imposition of liability. The Fourth Amendment freedoms of every citizen will be seriously jeopardized if Section 1983 is removed as a deterrent to such conduct.

Respectfully submitted,

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